Supreme Court, U. S.
FILED
MAY 10 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1593

MRS. MABLE SKINNER,
Plaintiff-Petitioner

VERSUS

MALLARD TRUCK LINES, INC., ET AL
Defendants-Appellees

THE PETITION OF MRS. MABLE SKINNER FOR WRIT OF CERTIORARI OR REVIEW TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

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APPENDIX

(to be filed after Writ granted)

1. Notice of Writ Denied by the Supreme Court of Louisiana

2. Opinion of the Court of Appeal, First Circuit, State of Louisiana

3. Application for re-hearing to the Court of Appeal, First Circuit, State of Louisiana and memorandum in support thereof

4. Application filed with the Supreme Court of Louisiana for Writ of Review in this case

5. Briefs filed on behalf of Mrs. Mable Skinner with the Court of Appeal, First Circuit, State of Louisiana

   a) Original brief of plaintiff-appellant

   b) Reply brief of plaintiff-appellant

   c) Briefs filed by the defendants with the Court of Appeal

   d) The written reasons for Judgment by the Trial Court Judge in the 19th JDC, Parish of East Baton Rouge

   e) Application for New Trial filed before the Trial Court on behalf of Mrs. Mable Skinner

   f) Instruction to the jury requested by the plaintiff but which were denied by the Trial Judge in charging the jury

   g) Charges of the Trial Court which were given to the jury

APPENDIX

(Items Attached)

	EXHIBIT
Notice from Supreme Court of Louisiana of denial of Writ	A
Opinion of Court of Appeal, 1st Cir., 340 So.2d 372	B
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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1976

No. _____

MRS. MABLE SKINNER

versus

MALLARD TRUCK LINES, INC.,
ET AL

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
FIRST CIRCUIT, STATE OF LOUISIANA

Petitioner, Mrs. Mable Skinner, respectfully prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of Louisiana entered herein on February 9, 1977 and to review the Judgment and Opinion of the Court of Appeal, First Circuit, entered on November 15, 1976.

O P I N I O N

The order of the Supreme Court of Louisiana was accomplished by a notice of "Writ Denied. The result is correct," signed by four out of seven Justices dated February 9, 1977, is hereto attached at page 105. The Opinion of the Court of Appeal is found at 340 So.2d 372; the Supreme Court of Louisiana denied Writs at 341 So.2d 1125.

JURISDICTION

The final order of the Louisiana Supreme Court was made and entered on February 9, 1977, and is appended hereto at page 105. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I. THE STATE OF LOUISIANA ACTING THROUGH ITS JUDICIARY VIOLATED THE U S CONSTITUTION, AMENDMENTS 5th AND 14th BY (1) DENYING MRS. SKINNER EQUAL PROTECTION OF THE LAW; (2) DENYING HER DUE PRO-

CESS OF LAW; (3) PERMITTING THE TAKING OF HER PROPERTY WITHOUT JUST COMPENSATION IN VIEW OF THE FOLLOWING ACTS BY THE COURT:

(A) ALTHOUGH THE FEDERAL GOVERNMENT REQUIRED SAFETY PROVISIONS TO BE PLACED IN THE CONTRACT (see exhibit P-7), WHICH READS AS FOLLOWS:

"VIII. SAFETY; ACCIDENT PREVENTION: IN THE PERFORMANCE OF THIS CONTRACT, THE CONTRACTOR (T. L. JAMES AND CO.) SHALL COMPLY WITH ALL APPLICABLE FEDERAL, STATE AND LOCAL LAWS GOVERNING SAFETY,.... THE CONTRACTOR SHALL PROVIDE ALL SAFEGUARDS, SAFETY DEVICES AND PROTECTIVE EQUIPMENT AND TAKE ANY OTHER NEEDED ACTIONS, ON HIS OWN RESPONSIBILITY, OR AS THE STATE HIGHWAY DEPARTMENT CONTRACTING OFFICER MAY DETERMINE, REASONABLY NECESSARY TO

PROTECT THE LIFE AND HEALTH OF EMPLOYEES ON THE JOB AND THE SAFETY OF THE PUBLIC AND TO PROPERTY IN CONNECTION WITH THE PERFORMANCE OF WORK COVERED BY THIS CONTRACT;"

AND ALTHOUGH THE LOUISIANA LAW PROHIBITED THE TRUCKS BRINGING THE SAND AND GRAVEL TO THE T.L. JAMES JOB IN OVERLOADED TRUCKS AND IN SPITE OF THE HOLDING BY THE JURY IN THIS CASE THAT THE OVERLOADING OF THE TRUCK WHICH KILLED SKINNER WAS THE PROXIMATE CAUSE OF HIS DEATH; IN SPITE OF THE FACT THAT T. L. JAMES HAD KNOWLEDGE OF THE OVERLOADING OF THE TRUCKS BY THE DEFENDANT, MATERIALS TRANSPORT, INC., FOR THE PREVIOUS 18 MONTHS, THE COURT OF APPEAL OF LOUISIANA ERRONEOUSLY HELD THAT T. L. JAMES DID NOT HAVE A DUTY TO PREVENT AND STOP THE OVERLOADING OF THE TRUCKS BY MATERIALS TRANSPORT, INC., IN BRINGING SAND AND GRAVEL TO ITS JOBSITE AND

IGNORED THE CONTRACT PROVISIONS AB OVE QUOTED WHICH PLACED THAT DUTY UPON T. L. JAMES AND COMPANY, INC.

(B) IT WAS ERROR OF LAW FOR THE TRIAL COURT TO REFUSE TO GIVE THE PROPER LAW AND ADEQUATE INSTRUCTIONS AS TO THE LAW TO THE JURY IN THIS CASE ALTHOUGH REQUESTED BY PLAINTIFF IN SPECIAL INSTRUCTIONS NUMBERS 8 and 9 to 32 AND IT WAS ERROR OF LAW FOR THE COURT OF APPEAL TO REFUSE TO APPLY THE SUPREME COURT DECISIONS OF THE LAW REQUIRING THE COURT OF APPEAL TO ACCEPT THE TESTIMONY OF THE DEFENDANTS WHO WERE PARTIES TO THE ISSUANCE AND RECEIVING OF THE PURCHASE ORDER IN QUESTION AS TO THEIR RIGHTS AND OBLIGATIONS UNDER THE PURCHASE ORDER AND THE COURT OF APPEAL COMMITTED ERROR WHEN IT STATED IT DID NOT BELIEVE MR. SPOHRER, MR. HENRY JOHNSTON AND MR. H. ALLAN THOMASON AND IT WAS ERROR OF LAW FOR THE COURT OF APPEAL IN FAILING TO HOLD THAT T.L.

JAMES AND CO., COULD TERMINATE THE SERVICES OF MATERIALS TRANSPORT, INC., MALLARD TRUCK LINES, INC., OR HAULING, INC., AT ANY TIME WITHOUT THE PARTIES HAVING RECOURSE IN VIEW OF THE LAW OF LOUISIANA; HAD MRS. SKINNER BEEN GIVEN THE BENEFIT OF THE LOUISIANA LAW, THE COURT OF APPEAL WAS REQUIRED TO HOLD T.L. JAMES AND CO. LIABLE TO MRS. SKINNER FOR ALL OF HER LOSSES SINCE UNDER EXISTING LAW OF LOUISIANA THE COURT OF APPEAL WAS BOUND TO HOLD THAT MATERIALS TRANSPORT, INC., ITS DRIVER, RODERICK W. LACOMBE, MALLARD TRUCK LINES, INC., AND/OR HAULING, INC., WERE ALL SERVANTS OF T.L. JAMES AND CO. INC., AND ITS FAILURE TO SO HOLD IN EFFECT DENIED MRS. SKINNER THE BENEFIT OF LOUISIANA LAW.

(C) THAT THE JUDICIARY DENIED MRS. SKINNER THE RIGHT OF JURY TRIAL WHEN SHE WAS AUTHORIZED TO HAVE HER CASE TRIED BY JURY, AND THEN THE TRIAL COURT REFUSED TO PROPERLY AND ADEQUATELY INSTRUCT THE JURY AS TO THE LAW; REFUSED TO ACCEPT

THE CHARGES PRESENTED TO THE COURT ON BEHALF OF THE PLAINTIFF, MRS. SKINNER, AND REFUSED TO CHARGE THE JURY AS TO THE LAW DEFINING INDEPENDENT CONTRACTOR, MASTER SERVANT RELATIONSHIP IN A WAY THAT THE JURY COULD TAKE THE FACTS AND THE LAW AND PROPERLY HOLD T.L. JAMES AND CO., INC., AS THE MASTER OR EMPLOYER OF MATERIALS TRANSPORT, INC., MALLARD TRUCK LINES, INC., AND/OR HAULING, INC., AND RODERICK W. LACOMBE; AND THE COURT OF APPEAL AND THE SUPREME COURT ERRED AS A MATTER OF LAW IN FAILING TO CORRECT THE ERRORS OF THE TRIAL COURT WHICH FAILED TO GIVE THE JURY THE PROPER INSTRUCTIONS AS TO THE LAW IN THIS CASE AND IN FAILING TO APPLY THE STATE LAW TO THE CASE WHICH WOULD BENEFIT MRS. SKINNER IN DECIDING THE CASE ON THE MERITS ALL OF WHICH ERRORS BEING SO COMPOUNDED WITH EACH OTHER THAT THEY ACTUALLY AMOUNTED TO DENYING DUE PROCESS OF LAW TO MRS. SKINNER AND THEREFORE PRESENTS A FEDERAL QUESTION.

II. SINCE THE FEDERAL GOVERNMENT, THROUGH CONGRESS, INITIATED AND FINANCED 90% OF THE INTERSTATE HIGHWAY SYSTEM, AUTHORIZED THE DEPARTMENT OF TRANSPORTATION OF THE U S GOVERNMENT TO USE THE STATE OF LOUISIANA THROUGH THE DEPARTMENT OF HIGHWAYS AS ITS AGENT IN CONSTRUCTION OF INTERSTATE HIGHWAY SYSTEM, BUT RETAINED CONTROL OVER IT BY APPROVING PLANS, DESIGNS, ROUTE, BIDDING, APPROVAL OF CONTRACTS TO BUILD, RETAIN RIGHTS TO INSPECT AS CONSTRUCTED AND MUST APPROVE THE COMPLETED HIGHWAY BEFORE ACCEPTED AND PAID FOR BY THE GOVERNMENT; THE CONTRACT OF T.L. JAMES AND CO., AND DEPARTMENT OF HIGHWAYS WHICH WAS APPROVED BY THE DEPARTMENT OF TRANSPORTATION OF THE U S GOVERNMENT MUST BE CONTROLLED BY FEDERAL LAW AND IT WAS ERROR FOR THE STATE COURTS TO FAIL TO APPLY FEDERAL LAW IN THE APPLICATION OF THE CONTRACT OFFERED IN EVIDENCE AS P-7.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

1. "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

   United States Constitution, Article 3, Section 2

2. "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby. Any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

   United States Constitution, Article 6, (Cl. 2)

3. "...no person shall be...deprived of life, liberty, or property, without due process of law;...nor shall private property be taken for public use, without just compensation."

   United States Constitution, Amend. 5

4. As used in the various guarantees against the taking of property without due process of law, the term 'property' is used in its most

general sense as embracing everything over which a man may have exclusive control or dominion; and it has been held broad enough to embrace all character of vested rights whether or not they may technically be called property rights.

U. S. Northern Pacific Railroad Company, 41 S.Ct. 439; Godchaux Company vs. Estopinal, 83 So. 690; Simpson vs. Stanten, 193 S.E. 64

5. Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amend. 14, Section 1

6. The provision in the 14th Amendment against denial of due process of law to a litigant is made directly applicable to the State's action in judicial proceedings, as well as through other agents of the State.

State vs. Hedgebeth, 45 S.E. 2nd 563; 68 S.Ct. 1185; 334 U.S. 806; 92 L.Ed 1739

7. A denial of due process of law by State actions is satisfied by showing that private parties have been aided in some way by government's thumb on the scales.

International Association of Machinist v. Sandsbury, 277 S.W. 2d 776

8. When authority derives in part from government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to the exercise by government itself for purposes of determining whether a constitutional right has been violated.

Public Utilities Commission of District of Columbia vs. Pollak, 72 S. Ct. 813; also C.B.S. Inc. vs. Democratic National Committee, 93 S.Ct. 2080 at page 2123.

9. "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

***

(3) "By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or where any title, right, privileges or immunity is specially set up or

claimed under the Constitution, treaties or statutes of, or a commission held, or authority exercised under, the United States."

28 U.S.C. 1257(3)

10. "The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to construction or reconstruction of highway."

23 U.S.C. 101

11. "It is hereby declared that the prompt and earlier completion of the national system of interstate and defense highways, so named because of its primary importance to the national defense and hereafter referred to as "the Interstate System", is essential to the national interests and is one of the most important objectives of this act. . ."

23 U.S.C. 101

12. (e) "The Secretary (Dept. of Transportation of United States) shall have authority to approve in whole or in part the federal-aid primary system, the federal-aid secondary system, and the Interstate System, as and when such systems or portions thereof are designated, or to require modifications or revisions thereof. No federal-aid system or portion thereof shall be eligible for projects in which Federal funds participate until approved by the Secretary..."

23 U.S.C. 103

13. (d) "On any highway project in which Federal funds hereafter participate, or on any such project construction since December 20th, 1944, the location, form and character of informational, regulatory and warning signs curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of State Highway Department with the concurrence of the Secretary, who is directed to concur only in such installation to promote the safe and efficient utilization of the highways..."

23 U.S.C. 109

14. (a) "The construction of any highways or a portion of highways located on the Federal aid system shall be undertaken by the respective State Highway Departments or under their direct supervision. Except as is provided in Section 117 of this title, such construction shall be subject to inspection and approval of the Secretary. The construction work and labor in each State shall be performed under the direct supervision of the State Highway Department and in accordance with the laws of that State and applicable Federal laws..."

23 U.S.C. 114

15. "After December 31, 1967, each State should have a highway safety program, approved by the Secretary, designed to reduce traffic accidents and deaths, injuries and property damage resulting therefrom, on highways on the Federal-aid system. Such highways safety program should be in accordance with the uniform standards approved by the Secretary and should include, but not limited to, provisions for effective accident record system and measures calculated to improve driver performance, vehicle safety, highway design and maintenance, traffic control, and surveillance of traffic for detection and correction of potentially high accident locations..."

23 U.S.C. 135

16. "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law; suit, and equity, or other proper procedure for redress."

42 U.S.C. 1983

17. Art. 1901. "Agreements legally entered into have the effect of laws on those who have formed them.

They can not be revoked unless by mutual consent of the parties, or for causes acknowledged by law.

They must be performed with good faith."

Article 1901, La. Revised Civil Code.

18. Art. 1902. "But a contract, in which anything is stipulated for the benefit of a third person, who has signified his assent to accept it, cannot be revoked as to the advantage stipulated in his favor without his consent."

Article 1902, La. Revised Civil Code.

19. Contract between Department of Highways of Louisiana and T. L. James Company, Inc., as part of Required Provisions in all Federal-aid Construction Contracts, provides:

A. "No person shall drive or move any vehicle, nor cause or knowlingly permit any vehicle owned or controlled by him to be driven or moved on any highway or this state when such vehicle is of a size or weight exceeding the limitations stated in this chapter or otherwise in violation of this chapter, and the maximum size and weight of vehicles herein specified shall be lawful throughout the State."

R.S.32:54

20. VIII. SAFETY, ACCIDENT PREVENTION.

"In the performance of this contract, the contractor (T.L. James and Company, Inc.) shall comply with all applicable Federal, State and local laws governing safety, health and sanitation. The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions, on his own responsibility, or as the State

Highway Department contracting officer may determine, reasonably necessary to protect... the safety of the public and to protect property in connection with the performance of the work covered by this contract.

Contract for Federal aid project number I-10-3 (53) 134 (plaintiff's exhibit 7 page 4 of attachment 1)

21. Provisions in Contract in regard to:

"INSURANCE:

. . . the contractor (T. L. James and Company, Inc.,) will be required to carry insurance of the following kinds and amounts:

PUBLIC LIABILITY:

The contractor shall furnish evidence to the Department that,

with respect to the operations he performs, he carries regular contractors public liability insurance providing a limit of not less than Two Hundred Thousand ($200,000.00) Dollars for damages resulting out of bodily injuries to or death of one person, and the subject to that limit for each person, a total limit of Four Hundred Thousand ($400,000.00) Dollars for damages arising out of bodily injuries to or death of two or more persons in one accident..."

If any part of the work is sub-let similar insurance shall be provided by or in behalf of the sub-contractors to cover their operations.*

22. DEFINITIONS:

As used throughout this contract, the following terms shall have the meaning set forth below:

(a) The term "head of the agency" or "Secretary" as used herein means the Secretary,

* Federal Aid project No. I-10-3(53) 134 (plaintiff's exhibit 7 page 33)

the Under Secretary, any assistant secretary, or any other head of assistant head of the executive or military department or other Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) Except as otherwise provided in this Contract, the term "subcontracts" includes purchase orders under this contract.

Additional definitions may be included provided they are not inconsistent with the clause or the provisions of these regulations.

41 CFR 1-7.102-1

23. SUBCONTRACTOR RESPONSIBILITY:

(a) To the extent that a prospective contractor proposes to perform the contract by subcontracting, determinations regarding the responsibility of prospective subcontractors may be necessary in order to determine the responsibility of the prospective prime contractor. Determinations concerning the responsibility of prospective subcontractors generally should be made by the prospective prime contractor (see I-1.603 relating to subcontractors listed on any list of debarred, suspended, and ineligible contractors). A prospective prime contractor may be required to (1) provide written evidence regarding the responsibility of proposed subcontractors, or (2) show that he has an acceptable and effective purchasing and subcontracting system which includes a method for determining subcontractor responsibility."

41 CFR 1-1.1206

24. La.R.C.C. Art. 2315 provides:

"Art. 2315. Every act whatever of man that causes damage to another obliges him by whose

fault it happened to repair it. "The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee is inherited by his legal, instituted or irregular heirs, subject to the community rights of the surviving spouse.

"...a right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of actions survives, is inherited by his legal, instituted or irregular heirs...."

25. The right of action by one injured as a result of negligence of another against the negligent party to recover damages sustained by reason of such injury is "property" within protection of this 14th Amendment.

Martinez v. Fox Valley Bus Lines, 17 F. Supp., 376

26. The right to a jury trial under State Law embraces the right to have the jury properly instructed as to the law applicable to the case. A State trial Judge is required to give correct and adequate instructions as to the governing law irrespective of whether he is requested to do so; in certain circumstances omissions from a charge

may amount to violation of due process.

Bellew vs. Susver, 320 F. Supp 1233, U. S. vs.La. 70 S.Ct. 914, Walker vs. Sauvinet, 92 S.Ct. 93, 78 S.Ct. 270

27. The right to a jury trial in civil cases at commonlaw, whether guaranteed by the Constitution or statute, should be jealously guarded by the Courts.

Jacob vs. N.Y., 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166; Bailess vs. Travelers Insurance Co., 113 U.S. 316, 5 S.Ct. 494, 28 L.ed 989

28. Any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Demick vs. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.ed 603, 456 F. 2d 129, 471 F.2d 755

29. The function of the Supreme Court under the 14th Amendment in reference to State juries is not to prescribe procedures but is essentially to protect integrity of the trial process by whatever means the State sees fit to employ.

Fay vs. People of New York, 67 S.Ct. 1613, 332 U.S. 261, 91 L.Ed 2043

30. "uncontradicted testimony by president of contracting company...as to business transaction between parties, and as to interpretation of the contract, must be accepted as true."

B. Segall Co. v. Trahan, 290 So.2d 854

This recent case was simply an affirmation of the principles established by years of jurisprudence: Olds v. Ashley, 250 La. 935; 200 So. 2d 1 (1967); Ruthardt v. Tennant, 252 La. 1041; 215 So.2d 805 (1968); Campo v. LaNasa, 173 So.2d 365; Cole v. Central Contracting Company, 5 La. App. 513 (1926).

31. La. Code of Civil Procedure Art. 1731.

"Except as limited by Article 1733, the right of trial by jury is recognized."

32. La. Code of Civil Procedure Art. 1732.

"A party may demand a trial by jury of any issue triable of right by a jury in a pleading filed not later than ten days after the service of the last pleading directed to such issue."

STATEMENT OF THE CASE

The petition of Mrs. Mable Skinner for a Writ of Certiorari to review the judgment of the state courts of Louisiand in a suit filed by Mrs. Skinner, widow of James M. Skinner, for damages resulting from his wrongful death as result of an automobile-truck collision. Defendants are (1) Mallard Truck Lines, Inc., owner of the truck operated by Lacombe; (2) H. Allen Thomason, principal stockholder or sole owner of Mallard Truck Lines, Inc., (3) Materials Transport, Inc., doing business as Southeastern Materials Company; (4) Feliciana Sand & Gravel Company, Inc., (5) Hauling, Inc., (6) Henry Johnston, principal stockholder and sole owner of Feliciana Sand & Gravel Co., Inc., (7) T.L. James and Co., Inc., sometimes referred to as T. L. James, (8)Highland Insurance Co., insurer of T.L. James; and Employers Commercial Union Insurance Co., insurer of Mallard, with limited insurance of $5,000.00 which was paid to the intervenor, the Workmen Compensation insurer of James Skinner, Trinity Insurance Co.

The federal questions involved in this case were raised by Mrs. Skinner through counsel when she presented the federal law to the trial court which controlled the interpretation of the contract which defendant, T. L. James, Inc., had entered into with the state of Louisiana through the Department of Highways to build a portion of Interstate Highway 10, Federal Aid Project Number I-10-3 (53) and I-10 route between Gross Tete and Ramah in Iberville Parish Louisiana. Counsel requested by special instructions numbers 10, 11, 11A, 32, (see page 640-663 of Tr) given to the court that the trial court instruct the jury as to the federal law in the interpretation of the contract in question in view of the federally required provisions in the contract offered in evidence as P-7. The trial court refused to give the special instructions requested by the plaintiff and petitioner's counsel made objections to the court's refusal which appears on page 1499 through 1500 of the transcript of the record filed with the Court of Appeal in this case.

The same federal questions as pre-

sented to the trial court by request of special instructions of the federal law to the jury were presented to the Court of Appeal under assignment of errors as shown in appellant's brief filed in the transcript and hereinafter elaborated on, which the Court of Appeal erroneously decided as shown in their opinion cited as 340 So.2d at 372 which is hereinafter shown in detail.

Then the same federal questions were presented to the Supreme Court under assignment of errors presented to it in an Application for Writ of Review to the Supreme Court of Louisiana and this Court refused to act on the assignment of errors presented to it when it denied a writ on February 9, 1977.

There were numerous points of law raised in the trial court by special instructions requested of the trial court to be given to the jury. The same questions of law were raised before the Court of Appeal by giving them the applicable state law, which it refused to give Mrs. Skinner the benefit of; and the same law was presented to the Supreme Court of Louisiana which also refused to give Mrs.

Skinner the benefit of the law of Louisiana as declared by the Supreme Court of Louisiana. This amounted to denying Mrs. Skinner the equal protection under the Louisiana Law as established by Louisiana Supreme Court. This raised a federal question showing that Mrs. Skinner was not only denied equal protection under the law but she was denied due process of the law because the court refused to apply state law to the facts proven in this case for the benefit of Mrs. Skinner and also the state courts denied Mrs. Skinner in substance a jury trial by refusing to adequately instruct the jury as to the law in the case and thereafter refusing to correct the errors committed by the trial court in making the legal error of not giving the trial court jury the proper and adequate law to correctly decide the case. This became a denial to Mrs. Skinner of due process of law and a violation of the Federal Constitution, the 14th Amendment, and became a denial to Mrs. Skinner of equal protection under the Louisiana Law which also raised a federal question by being in violation of the federal Constitution; and, also

because the irresponsible corporation, Materials Transport, Inc., which was hauling and delivering sand and gravel to T. L. James, Inc., on the job with permission of T. L. James and Co., were financially bankrupt and had not sufficient insurance to pay the losses which they caused to Mrs. Skinner and her husband, she has been denied just compensation or received nothing for her loss and this is through the action of the state of Louisiana acting through its judiciary which amounts to permitting the taking of her property without just compensation in violation of the federal constitution. This will be made quite clear in detail hereinafter.

Not only was it grossly unjust for the judiciary in Louisiana to refuse to accept the federal law in interpreting the contract between the prime contractor and the state of Louisiana in view of the Federal Government's initiation, financing and control thereof, but it was also grossly unjust and unfair to Mrs. Skinner for the state courts in its refusal at both of the appellate court levels to refuse to give Mrs. Skinner the benefit

of the law as established by the Supreme Court of Louisiana. This action of both the Court of Appeal and the Supreme Court in failing to apply Louisiana Law correctly to the facts in this case was grossly unjust to Mrs. Skinner and did create a federal question by denying her due process of law as established by Louisiana, also in violation of the 14th Amendment of the U S Constitution. This will be explained in detail in connection with the discussion of the federal questions hereinafter.

The truck causing Skinner's death was negligently overloaded in violation of State Law and negligently driven in carrying sand to the Interstate 10 project being built by T. L.James and Company, as prime contractor. On March 13, 1972, the decedent, James M. Skinner, while employed by Arrow Tobacco Company and in the course of his employment, was driving on Hooper Road north of Baton Rouge, Louisiana when his car, while on its proper side of the road, was crushed by a large gravel truck operated by Lacombe, employee of Materials Transport, Inc., while hauling sand to the jobsite of T. L.

James and Co., to build Federal Aid Project number I-10-3 (53) 134; and I-10 Route. There is no question that the wrongful acts committed by the driver of the truck proximately caused the death of Mr. Skinner, but the question for Your Honors is whether the wrongful acts of the contractor, T. L. James and Co., Inc., in the performance of the Federal Aid Construction Project contract, and the contract itself required T. L. James and Co., Inc., to compensate Mrs. Skinner for her property loss in the loss of her husband? And, its failure to so compensate her is depriving her of her property rights without just compensation in violation of the United States Constitution.

Congress authorized the construction of the Interstate Highway System in 23 U.S.C. 101, et seq, for the intended purpose of providing a nationwide system of highways adequate to meet the needs of national defense and interstate commerce (U.S. v. Certain Parcels of Land in Peoria County, Ill. 314, F. 2d 825). Congress in Section 101 of that act declared the policy and definitions to be used in connection with the Interstate Highway

System. The pertinent part reads:

> "The term 'construction' means the supervising, inspecting, actual building and all expenses incidental to the construction or reconstruction of a highway..." (Emphasis added)

Congress then designated the Department of Transportation as the Federal Agency to negotiate with and supervise the various State Department of Highways. In due time and course, the Louisiana Department of Highways under the supervision and authority of the Department of Transportation, Bureau of Federal Roads, U. S. Government, procured a contract with T. L. James and Company, Inc., approved by Secretary of Department of Transportation to construct the portion of the interstate highway system in question in this case (Grosse-Tete-Ramah Project No. I-10-3(53) 134 at a cost of $9,562,000.00, which was built to further interstate commerce which can only be regulated by Federal Government.

The Federal Government as shown by the statutory and regulatory authorities above cited maintained an absolute control over the Interstate Highway System

in the United States to the extent that the Federal Government authorized the Department of Transportation, acting through the Secretary, to act prior to construction and approve the plans and specifications, the routes, methods of bidding, the letting of the contract and actually had to approve each contract which was let to the general or prime contractor; and as stated above the Federal Government did authorize each State through the Department of Highways to act as the Agency of Federal Government in the construction of the Interstate Highway System, but retained the right to inspect during construction and accept the completed highway before paying its 90% cost of building the highway.

The Federal Government also maintained the standards in regard to labor, employment of minority groups and in the employment of small businesses and set up the policies in regard thereto which were carried out through the Department of Transportation of the Federal Government in the construction of the Interstate Highway System; therefore, the plaintiff has shown that in addition to the con-

trols above mentioned the Department of Transportation through the Secretary, had additional right to control the Interstate project involving the contract in question by 41 CFR 1-1.1206 which provided in part as follows:

> "Determination concerning the responsibility of prospective subcontractors generally should be made by the prospective prime contractor (see 1-1.603 relating to subcontractor's listing on any list of debarred, suspended and ineligible contractors).....
>
> "Or (2) show that he had an acceptable and effective purchasing and subcontracting system which includes method for determining subcontractor's responsibility."

And further the Code of Federal Regulations at 41 CFR 1-7.102-1 sub-paragraph (c) provided in part as follows:

> "(c) Except as otherwise provided in this contract, the term "subcontract" includes purchase orders under this contract."

The purchase order for sand and gravel issued by T. L. James and Co., to Feliciana Sand & Gravel was a sub contract.

The Department of Transportation acting through the Secretary required the

following provision be placed in the contract between T.L. James and Co., and Department of Highways of Louisiana which contract was being performed when Skinner was killed. This part of the contract reads as follows:

> "VIII. SAFETY: ACCIDENT PREVENTION:
>
> In the performance of this contract, the contractor (T.L. James and Co. Inc.,) shall comply with all applicable Federal, State and local laws governing safety, health and sanitation. The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions on his own responsibility, or as the State Highway Department contracting officer may determine, reasonably necessary to protect.... the safety of the public and to protect property in connection with the performance of the work covered by this contract. (Extract from the contract in question offered in evidence as Exhibit P-7 page 4 of Attachment 1 pertaining to Federal Aid Project No. I-10-3(53) 134.)"

In the same contract above referred to was the following provisions in regard to:

> "INSURANCE.....the contractor(T.L. James and Company, Inc.) will be required to carry insurance of the following kinds and amounts:

1) Public Liability:

The contractor shall furnish evidence to the department, that with respect to the operations he performs, he carries regular contractor's public liability insurance providing a limit of not less than Two Hundred Thousand Dollars for damages resulting out of bodily injuries to or death of one person, and is subject to that limit for each person a total of Four Hundred Thousand Dollars for damages arising out of bodily injuries to or death of two or more persons in one accident...."

"If any part of the work is sublet similar insurance shall be provided by or in behalf of the subcontractors to cover their operations."

T. L. James and Co., Inc., was the prime or general contractor which contracted to construct this particular highway project located in Iberville Parish in the State of Louisiana. Pursuant to the contract, T. L. James and Co., issued a purchase order to Feliciana Sand and Gravel Co., for the delivery of all requirements of sand and gravel to the construction site; which made the supplier and hauler a subcontractor on the project. From the time the purchase

order was sent to Feliciana Sand and Gravel, and the time for the delivery of sand and gravel to begin, Feliciana Sand and Gravel acquired work closer to its homesite; thus, allowing a higher profit margin. As a result of this, Mr. Johnston, as owner and manager of Feliciana Sand and Gravel, allowed Mr. H. Allen Thomason, the sole owner of Materials Transport, Inc., and Mallard Truck Lines, Inc., to request, from Mr. Spohrer, the Superintendent in charge of the project for T. L. James, permission to supply part of the sand and gravel only under the purchase order requirements; but, only if Thomason could secure permission from T. L. James, acting through its superintendent, Mr. Henry Spohrer. Both Feliciana Sand and Gravel and T. L. James, Co., retained the right to terminate Mr. Thomason and his corporations at any time with or without cause. Thus, after H. Allen Thomason obtained this permission for Materials Transport,Inc., the latter corporation and its hauler, Hauling, Inc., became servants of T.L. James and Co., or in the alternative, became subcontractor on the project to

build I-10 by T. L. James and Co.,Inc.

Under the arrangement, Mr. Thomason, through Materials Transport, Inc., supplied part of the sand and gravel from the pits to job sites where the trucks were weighed by scales owned and operated by T. L. James and Co., Inc. The weigh tickets from the trucks were introduced as evidence and showed that the trucks delivering the sand and gravel were all grossly overweight as to every load for 18 months prior to Mr. Skinner's death, in violation of both the State Law governing the weight of highway vehicles and to the Federally required provisions of the Federal Aid Project contract (P-7) which pertinent part reads as follows:

> "In the performance of this contract, the contractor shall comply with all applicable Federal, State and local laws governing safety, health and sanitation. The contractor shall provide all safeguard safety devices and protective equipment and take any other needed actions... to protect the life and health of employees on the job and the safety of the public..." (Emphasis added)

By virtue of the death of Mr. James Skinner, Mrs. Mable Skinner inherited a

property right by operation of Louisiana Law Article 2315 of the Louisiana Civil Code states as follows:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."
>
> * * *
>
> ..."a right to recover damages under the provision of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal-instituted or irregular heirs, whether suit has been instituted thereon by the survivor or not."

By virtue of this article Mrs. Mable Skinner has exerted her legal property right in the State Courts and by the same authority is now asking for this Honorable Court to review the decision of the State Courts in light of the Federal Constitution provisions, statutes, contract and the Federal common law.

The Louisiana Courts have denied recovery to Mrs. Skinner for her loss under the property right she acquired at the death of her husband. This is a denial of her constitutional right to just compensation for said loss and a denial of

her constitutional right to due process of law by the State Courts. This is true because the subcontractor, Materials Transport, Inc., and Mallard Truck Lines, Inc., the two solely owned corporations of H. Allen Thomason, who were ordered to pay Mrs. Skinner for her losses are bankrupt and insolvent; that although T. L. James and Co., Inc., which is solvent, made millions of dollars off this project, but refuses to assume and pay its obligations to Mrs. Skinner, and so far has been aided in their refusal by the Louisiana Courts, which have ignored the positive law of this case.

The Louisiana Law guarantees to each party in a civil suit the right to a trial by jury. Mrs. Skinner requested and was granted a jury trial in this matter at the trial court level, however, the jury was so inadequately instructed as to the applicable law in this case with the result that the trial by jury became non-existent and Mrs. Skinner was effectually denied the right to a trial by jury as guaranteed under the laws of the State of Louisiana. In addition, the Appellate Court refused to recognize the errors of law committed

by the trial court and to take action to correct them. In fact, the Appellate Court committed errors of its own by disregarding, ignoring and actually not accepting the testimony of the parties to this lawsuit, which established facts under Louisiana Law which would make Lacombe a servant of T. L. James and Co., Inc., and the latter liable to Mrs. Skinner under the well established Doctrine of Respondeat Superior, as can be seen from the opinion hereto attached. It is for this reason that plaintiff now urges this Honorable Court to examine the constitutionality of such action by the State Judiciary for the State of Louisiana. The erroneous instructions and the failure of the judiciary to correct them amounted to a denial of due process and a denial of equal protection of the law; in addition the action of State Court in this case, amounted to taking of Mrs. Skinner's property rights (wrongful death of her husband) without just compensation. This is true because the State Court Judgment in favor of Mrs. Skinner and against Materials Transport, Inc., and Mallard Truck Lines, Inc., is not worth the

paper it is written on because T. L. James and Co., Inc., through its superintendent, Mr. Spohrer, permitted these insolvent and bankrupt corporations to deliver sand and gravel to the Interstate Project in overloaded trucks, without requiring the trucks to be insured for $200,000.00 as required by its contract; and further the State Courts further denied Mrs. Skinner due process of law by not holding that T. L. James and Co., became the insurer of Materials Transport, Inc., and Mallard Truck Lines as its subcontractors as provided by the law of Louisiana set out in said contract (offered in evidence as P-7).

The Federal questions sought to be reviewed by Your Honors were raised in the Trial Court in the following manner and by the following methods:

In order for the Trial Court Jury to have proper understanding and interpretation of the Federally required provisions of the contract offered in evidence as P-7 being a contract between T. L. James and Co., Inc., and Department of Highways of Louisiana which was approved by Department of Transportation

of the Federal Government through the Secretary, the Trial Court was asked to give plaintiff's instruction No. 11 (See it at page 641 of Transcript) to the Jury, which is quoted in part:

> "....3. In addition to the 50% requirments set forth in paragraph 2 above, the contractor shall furnish (a) a competent superintendent or foreman who is employed by him, who has full authority to direct performance of the work in accordance with the contract requirements, and who is in charge of all construction operations (regardless of who performs the work). And (b) such other of its own organizational capability and responsibility (supervision, management and engineering services) as the State Highway Department contracting officer determines it necessary to assure the performance of the contract."

The trial court also erred in refusing to give plaintiff's special instruction number 11A (seen at page 642 of Tr.) which reads as follows:

> "For purposes of interpreting the Federally required contract provisions inserted in the contract bewteen the State of Louisiana, Department of Highways, and T.L. James and Co., offered

> as Exhibit P-7, the following definition is applicable:
>
> "A subcontract means the establishment of a binding legal relation basically obligating the seller to furnish personal property or nonpersonal services and the buyer to pay therefor. A subcontract may call for the furnishing of supplies. Purchase orders are a type of subcontract.
>
> 41 CFR 1-1.208
> 41 CFR 1-8.101 (v)
> 41 CFR 1-7.102-1 (c)

The above special instructions were timely requested of the Trial Court to be given to the jury on behalf of the plaintiff before the case was submitted to the jury. The Trial Court refused to give the above instructions to the jury and refused to interpret the contract by the applicable Federal Law. The plaintiff through the counsel objected to the Court's refusal to give the said instructions to the jury as shown on pages 1499 and 1500 of the original Tr. before the Court of Appeal.

Plaintiff has shown as a matter of fact under Louisiana Law that Lacombe, driving for Materials Transport, Inc.,

Mallard Truck Lines, Inc., or Hauling, Inc., were all hauling servants and/or employees of T. L. James and Company, Inc., the prime contractor, because under Louisiana Law, T. L. James & Co. had absolute control over the whole of the project; not only by Louisiana Law was this made so; but, also, it was true under the terms of the contract itself quoted above which required the prime contractor, T. L. James and Co., to furnish a superintendent, in this case, Mr. Henry Spohrer, to have absolute control over all operations of the performance of the contract regardless of who performed the work or who brought the sand and gravel to the project. This provision of the contract in addition to the law of Louisiana gave T. L. James and Co., Inc., such control over the job that the defendants, Materials Transport, Inc., Mallard Truck Lines, Inc., and Hauling, Inc., as well as Roderick W. Lacombe were all servants or employees of T. L. James and Co., Inc. But, in the alternative, should it be considered by this Court that the defendants, Materials Transport,

Inc., Mallard Truck Lines, Inc., or Hauling, Inc., and/or Roderick W. Lacombe were not hauling servants or employees of T.L. James and Co., Inc., then, the Court must hold that Materials Transport,Inc., was a subcontractor on the job as described on attachment 1 page 4 of 4 pages (copy of which is made part of this petition in the appendix attached as Exhibit "D".

Should the Court fail to hold that Materials Transport, Inc., and Roderick Lacombe were the hauling servants of the prime contractor, T. L. James and Co., and by interpreting the contract P-7 under the applicable Federal Law, then the purchase order issued by T. L. James and Company is a subcontract and thereby making the hauler of the sand to T. L. James and Co., Inc., a subcontractor with result that Materials Transport, Inc., and/or Hauling, Inc. including Lacombe, the driver, were insured by T. L. James and Co., Inc., under the terms of the contract executed by T. L. James and Co., Inc., with the Department of Highways which contract was approved by the Federal Government through the Secretary of Department of Transportation and

this contract provides that T.L. James and Co., Inc., must provide liability insurance for the benefit of the public to the extent of $200,000.00 per person for all damages arising out of bodily injuries or the death of one person; and, as to any part of the work, which is sublet, similar insurance shall be provided by or in behalf of the subcontractor to cover their operations. This clearly makes T. L. James and Company insurers of Materials Transport, Inc., and its driver, Lacombe.

The Federal questions above described are again raised at the Trial Court level when the plaintiff filed application for a new trial and complained of the Trial Court's failure in its refusal to instruct the jury as to the applicable law in interpreting the contract by the Federal provisions of the Code of Federal Regulations, namely 41 CFR 1-1.208 and 41 CFR 1-8.101 (v) and objected to the Court's failing to treat the hauling companies and its driver as a subcontractor if they were not hauling servants of T. L. James and Co., Inc. (see pages 688 through 691 of the original tr. filed

with the Court of Appeal).

The Trial Court denied plaintiff's application for a new trial in this case on April 9, 1976. (See Tr. at page Z-2 Vol. I of 6).

Then the plaintiff appealed the case to the Court of Appeal, First Circuit, State of Louisiana.

The plaintiff raised the above Federal questions by assignment of errors before the Court of Appeal in its original brief filed with the Court of Appeal on behalf of the plaintiff pages 35 through page 40 of said brief. The same Federal Questions were presented to the Supreme Court of Louisiana in Mrs. Skinner's application for writs to that court. It denied a writ on Feb. 9, 1977. Although the project in question being carried out by the contract P-7 was to build Interstate Highway 10 in Louisiana and was initiated by the Federal Government through Congress and was subject to the absolute control of the Federal Government as authorized by Congress; and the Federal Law required the Department of Transportation, U. S. Govt. to supervise and approve the project and the following

Code of Federal Regulations at 41 CF 1-1. 1206, established a policy of the Federal Government in the construction of I-10, which reads as follows:

> "23 Subcontractor Responsibility:
>
> (a) To the extent that a prospective contractor proposes to perform the contract by subcontracting, determination regarding the responsibility of prospective subcontractors may be necessary in order to determine the responsibility of the prospective prime contractor. Determinations concerning the responsibility of prospective subcontractors generally should be made by the prospective prime contractor (see 1-1.603 relating subcontractors listed on any list of debarred, suspended, and ineligible contractors). A prospective prime contractor may be required to (1) provide written evidence regarding the responsibility of proposed subcontractors, or (2) show that he has an acceptable and effective purchasing and subcontracting system which includes a method for determining subcontractor responsibility."

This taken in connection with 41 CFR 1-7.102-1 which reads as follows:

> "c) Except as otherwise provided in this contract, the term

> "subcontract" includes purchase orders under this contract."

Thus proves the purchase order given by T. L. JAmes and Co., Inc., to Feliciana Sand and Gravel Company, Inc., which was partly being filled by Materials Transport, Inc., with the permission of T. L. James was a subcontract as shown by the above Federal Law.

In passing on this Federal Question the Court of Appeal erroneously said:

> "(3) It has been argued to the Court that the suppliers of sand and gravel must be treated as subcontractors under the interpretation of contract since these provisions of the contract by Federal authorities as the U S Government was financing all interstate operations on the basis of 90% paid by the U S Government and 10% paid by the State Government, and that Federal Law provides that a subcontract may call for the furnishing of supplies. Inasmuch as this is a contract entered into by a state agency, rather than a Federal agency, we are of the opinion that any interpretation of the terms used in the contract must be controlled by applicable State Law rather than Federal Law, irre-

spective of the fact that Federal monies were being used partly for the funding of the contract."

In making the above erroneous statement by the Court of Appeal, the Court ignored further facts that the Federal Government had absolute control of the project. The Federal Government initiated the project and set the standards for the construction of same and reserved the right to inspect and supervise the contract, provided for the bidding procedures and it had to approve the final letting of the contract. The Federal Government had a greater and controlling hand in the operation of the project than recognized by the State Court.

Furthermore, the Federal Government did not intend for its prime contractor in building the I-10 project in Louisiana to deal with irresponsible persons or parties whether they be treated as hauling servants of T. L. James and Co., Inc., or whether they be treated as subcontractors on the project. It is quite clear from the reading of the Code of

Federal Regulations, 41 CFR 1-1.1206 that T. L. James and Co., shall not deal with irresponsible subcontractors or irresponsible hauling servants and permit them to go on a highway without insurance or financial means to pay for losses and negligently run over and kill persons such as Mr. James M. Skinner and not be responsible to pay for same. The very purpose of the contract which required T. L. James and Co., Inc., to insure the subcontractors and naturally all of its agents, employees and servants, clearly indicate that there was no intention on the part of either the Federal Government or the State Government to permit T. L. James and Company to allow its hauling servants or its subcontractor to go out and negligently kill Mr. Skinner without compensating for same; and, if, the driver or the owner of the truck did not compensate for same the government expected T. L. James and Co., Inc., to be the insurer of the Materials Transport, Inc., or its driver.

The plaintiff contended that it was error on the part of the Trial Court not to instruct the jury as to the insurance

coverage in the case as set out in the contract pertaining to the prime contractor and its subcontractors and that it was error not to hold T. L. James and Company as insurer of Materials Transport, Inc. On this point the Court of Appeal said:

> "It is further argued that T. L. James was required to have insurance to cover its subcontractors, and thus it is liable. It could be reasoned that the State of Louisiana through the Department of Highways in letting contracts for various projects throughout the state mandates certain minimum insurance requirements from both the general or prime contractor as well as subcontractors doing work thereunder so as to protect members of the general public who may be injured by activities relating to the particular contract by having sufficient insurance coverage on behalf of those parties who may be at fault. It could be further said that it is the policy of the highway department to only let contracts to those individuals, partnerships, associations and corporations who are willing and show a desire to carry a requisite amount of public liability and property damage insurance so as to guarantee at least up to the insurance coverage payment for any damage occasioned by any member

> of the general public by fault of an insured.
>
> "We have searched the terms of the general contract, and in particular that portion requiring minimum insurance coverage, and can find no language therein defining the term "subcontractor" so as to aid this court in determining whether the contract intended to include within the term subcontractor the suppliers of material. Further, we find no language within the contract setting forth a general policy on the part of the state of Louisiana through the Department of Highways of an intention to mandate that any and every individual, partnership, association and corporation doing business on the project authorized by the contract be covered by a minimum amount of public liability and property damage insurance. Absent these two findings, this court must conclude that the term "subcontractor" as used in the contract was not intended to include the supplier of materials as regards the minimum insurance coverage, and this court cannot add that to the contract, nor can we establish such as state public policy."

The above decision by the State Court is absolutely in direct conflict with the policy of the Federal Government which initiated this project and

which directed the Department of Transportation through the secretary to maintain absolute control over the project through approving the plans, design, the bidding, the contract, the inspection of the job and the approval of it after it has been completed making the State Department of Highways, State of Louisiana nothing more than an agency of the Federal Government in carrying out the project. The policy of the Federal Government is clearly established to show that there was a policy on its part of an intention to mandate that any and every individual, partnership, association or corporation doing business on a project authorized by the contract be covered by a minimum of public liability and property damage insurance; and particularly was this true as to subcontractors and if Materials Transport, Inc., and its driver were not hauling servants then this was particularly true as to them as a subcontractor because under Federal interpretation of the purchase order the defendant, Materials Transport, Inc., was a subcontractor and insured by the terms of the contract offered in

evidence as P-7.

After the case was submitted to the Court of Appeal and it erroneously decided all the Federal Questions involved; and it also erroneously decided the issues in applying state law by failing to give Mrs. Skinner the benefit of state law in deciding other issues when these errors were approved by the Supreme Court of Louisiana, the result was that the State of Louisiana through judiciary has denied Mrs. Skinner equal protection of the laws which also amounted to taking her property without just compensation, all in violation of the 14th Amendment of the U S Constitution and in violation of the 5th Amendment of the U S Constitution. Furthermore, the state court has denied Mrs. Skinner due process of law in violation of the 14th Amendment of the U S Constitution by authorizing her a trial before jury under state law and then effectually denying her the benefit of a jury trial at trial level by not giving the jury the proper law as to the definition of independent contractor and refusing to give plaintiff's instructions on this relationship

ship as shown in plaintiff's special instructions number 8 and 9 and refusing to instruct the jury as to the proper interpretation of the contract in question under Federal Law. These errors made by the trial court were not corrected by the Court of Appeal but instead the Court of Appeal made the following erroneous observation:

> "As to the specification of error concerning the trial judge's instructions to the jury, we are of the opinion that in light of the Supreme Court's decision of Gonzales v. Xerox Corporation, 320 So.2d 163(La. 1975), there is no need for us to determine whether the trial judge was in error or not. Even if we would find the trial judge in error, under the holding of Gonzales, supra, rather than remanding for a new trial, we are compelled to render a decision."

What a gross injustice? Certainly, a denial of due process of law under the 14th Amendment.

The action of the State Court Judiciary in hearing this case through all of its courts and failing to give Mrs. Skinner the benefit of State Law created a Federal Question in that Mrs. Skinner was denied equal protection of the law

also denied due process of law in violation of the 14th Amendment of the U S Constitution and as a consequence had the effect of taking her property without just compensation because although she was due monetary judgment for her great losses against T. L. James and Co., she was denied same by the courts. This denial of due process and denial of equal protection under Louisiana Law did not take effect until it was obvious by the final decision of the Supreme Court in refusing to review the errors committed by the trial court and the Court of Appeal that the State Courts would not correct the errors; and for that reason the constitutional question raised by the judiciary in denying her due process of law and equal protection under the law did not arise; and, the Federal Questions could not have been asserted until the Supreme Court made its decision and refused to give Mrs. Skinner justice in this case.

The contract in question and a part of the federally required provisions thereof provided that "in the performance of the contract T. L. James and Co.,

Inc., shall comply with all applicable federal state and local laws governing safety. . . . The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed action, on his responsibility, ... reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance with the work covered by this contract."

Delivering the sand to the job was necessary in the performance of the contract and was part of the work required in connection with performance of the contract. This absolutely placed a duty on the contractor to prevent any unsafe conditions to exist particularly which it had a knowledge of.

T. L. James and Co., weighed all of the overloaded trucks that came to the job; was aware that all of the trucks were being overloaded and took no action to stop the overloading of the trucks. Eighteen months after the trucks had been delivering sand to the job in overloaded trucks, one of the trucks, being

overloaded caused the death of James M. Skinner.

The Trial Court and the Court of Appeal erroneously held that T. L. James had no duty to stop the overloading of the trucks bringing sand and gravel to its job even though it had knowledge of same and even though it was a violation of law, and Spohrer of T. L. James, Johnston of Feliciana and Thomason of Materials Transport, Inc., all admitted T. L. James and Co., could stop the practice by terminating the services of Material Transport, Inc., which the contract said T. L. James was required to prevent.

In this connection the Court of Appeal had this to say:

> "(2) It is additionally argued that the trial judge and jury erred in failing to find that T. L. James, Hauling, Inc., Henry A. Johnston, Feliciana and H. Allen Thomason were additionally responsible and legally liable for failing to remedy the overloading of the sand and gravel trucks. Both appellants argued that these defendants had knowledge of the overloading, that it was in violation of state law, that this overloading created a highly dangerous condition on the highway of the state, and

thus it was their duty to stop the overloading or refuse to accept the delivery of the sand and gravel because of the violation.

"It occurs to us that these defendants, and in particular T. L. James, are in no different position than an ordinary landowner who ordered several truck loads of landfill, and after several deliveries realized that they were overloaded but did nothing about it. We know of no duty imposed on these defendants, who had no direct control over the loading process, to stop the overloading or to refuse delivery. Since we conclude there is no duty, there is no error on the part of the judge or jury in failing to find them liable".

This statement by the Court of Appeal is absurd and ridiculous in face of the duty placed by the contract upon T. L. James and Co., to comply with all State Laws (this includes overloading law) and to require that all parties taking part in the performance of the contract to do it safely for the protection of the public. This was plainly a provision to protect the safety of Mr. Skinner. T. L. James and Co., and all parties down to the driver, Lacombe,

failed in their duty.

The Court of Appeal simply ignored the provisions of the contract which absolutely place such a duty on the part of T. L. James and Co., Inc., and also having ignored the testimony of the parties to the transaction pertaining to the purchase order asking for the delivery of the sand and gravel to the effect that all of the said parties admitted that T. L. James and Co., reserved the right to terminate the services of Materials Transport, Inc., or Hauling, Inc., or Mallard Truck Lines at will, without recourse on the part of the said corporations.

The court has refused to give Mrs. Skinner the benefit of state law on this subject as well as the law that says that the contract itself is the law of the case and has refused to enforce the obligations of T. L. James which it assumed by the terms of the contract.

Louisiana Law provides that if T.L. James and Company had the right to control Materials Transport, Inc., and its driver or Hauling, Inc., that there could be no independent contract rela-

tionship existing. In this case the contract provision as described by exhibit "D" in the Appendix to this petition shows that T. L. James and Company shall furnish a competent superintendent who is employed by it who has full authority to direct performance of the work in accordance with the contract requirements and who is in charge of all construction operations regardless of who performs the work..... and this provision placed absolute control of this project in the hands of Henry Spohrer, superintendent of T. L. James and Company and as such he had control of all of the truck drivers bringing sand and gravel to the job. In addition to this Louisiana Law provides that if T. L. James and Co., had the right to terminate the relationship with Materials Transport, Inc., or Mallard Truck Lines, Inc., or Hauling, Inc., and its driver, that this amounts to such control as to be antagonistic to or negates the existence of the relationship of independent contractor. It further holds that a contract of employment for an indefinite period of time as held by Garner v. Louisiana

State Board of Education at 277 So. 2d, 492 and Pechon v. National Corporation Service at 100 So. 2d, 213; Hickman v. Southern Pacific Transport Company 262 So. 2d, 385 and Landry v. American Surety Company of New York, 149 So. 2d. 738, that there can be no independent contractorship. The parties to the transaction who issued the purchase order and were carrying it out all testified that T. L. James and Company had the right to terminate the relationship with Materials Transport, Inc., Mallard Truck Lines, Inc., and Hauling, Inc., at any time. This would make Materials Transport, Inc., and its driver, Lacombe, as well as Mallard Truck Lines and/or Hauling, Inc., mere employees of T. L. James and Company and as such T. L. James and Company would be liable for their acts.

The trial court refused to give plaintiff's special instructions 8 and 9 to the jury and the Court of Appeal illegally, improperly and in violation of the law of the State of Louisiana, refused to give credence to the testimony of the parties to the transaction

involving the purchase order in question even tho all of these parties were not plaintiff's witnesses but were defendants' witnesses. By law their testimony must be accepted as true. In light of the decision of the Supreme Court of Louisiana, B. Segall Company v. Trahan, 290 So.2d 854 which held:

> ". . . Uncontradicted testimony by president of contracting company...as to business transaction between parties, and as to interpretation of the contract, must be accepted as true."

Therefore the testimony of Henry Spohrer and H. Allen Thomason as to the fact that under the arrangement that they had between T. L. James and Material Transport, that the relationship could be terminated at will was binding on the court. In spite of this fact the court held otherwise, when the Court of Appeal said:

> "Plaintiff-Skinner argues that the relationship between T. L. James and Hauling, Inc., and/or Materials Transport could be terminated at will, thus making the sand and gravel haulers mere employees. Though there are statements in the record by

witnesses for both sides that they were of the opinion that their relationship was terminable at will, we are not convinced that it was. When T.L. James issued the purchase order for so many yards of sand and gravel to be delivered at a certain price, to a particular sand and gravel hauler, it committed itself to purchase the sand and gravel under the terms of the purchase order. Though there was no formal written contract, T. L. James was obligated to pay for the sand and gravel, and the recipient of the purchase order was personally obligated to deliver. As long as the sand and gravel was being delivered as contemplated under the purchase order, the relationship could not be terminated". (Delivered by whom?)

This relationship as between T. L. James and Co., and Feliciana Sand and Gravel Company who was named in the purchase order may be held by the court to be binding and that the parties could not terminate same as to Feliciana Sand and Gravel Co., but only if the trucks were not overloaded and did not violate the law.

But this was absolutely not true

and not so as to Materials Transport, Inc., who was not a party to the purchase order, was not true as to Mallard Truck Lines who was not a party to the purchase order and was not true to Hauling, Inc., who was not a party to the purchase order and therefore the Court of Appeal and the trial court did not give Mrs. Skinner the benefit of Louisiana Law in making its conclusion and statements hereinabove, which did not agree with the testimony of the defendants' witnesses whose testimony was not in dispute and which were binding on the court as a matter of law.

Had the Court of Appeal and the Supreme Court given Mrs. Skinner the benefit of Louisiana Law there is no doubt that Materials Transport, Inc., was a servant of T. L. James and Company and T. L. James was liable for their acts. This denial to Mrs. Skinner of the benefit of Louisiana Law in this case in applying it to the facts as proved by her in the case did not become final nor binding until the Supreme Court affirmed the erroneous decision of the Court of Appeal on February 9, 1977 and

thereby in effect denied Mrs. Skinner the benefit of the plain Law of Louisiana which in effect denied her equal protection under the law as well as denied her due process of Louisiana Law and consequently this federal question did not rise until the Supreme Court of Louisiana made its erroneous decision on February 9, 1977 in refusing to correct the errors made by the trial court and the Court of Appeal in this case.

Another serious error of law committed by the trial court and the Court of Appeal and the Supreme Court which did not become final until February 9, 1977 when the Supreme Court refused to correct the error was when the judiciary denied Mrs. Skinner her legal right of trial by jury by the trial judge refusing to give proper instructions submitted by the plaintiff and in its general charge refusing to give the jury the definition of independent contractor as the court stated it would do for the jury's benefit and further failed to give adequate definitions of Agency, supplier, or prime contractor and consequently not only left the jury confus-

ed but unable to make a proper decision based on the facts and evidence in the case. This denial of the right of jury trial in substance to Mrs. Skinner was a serious legal error that did not finalize itself until the Supreme Court refused to correct the error and consequently did not become a violation of the Federal Constitution until all three courts had refused to give Mrs. Skinner the benefit of the law, a trial by jury by failing to instruct the jury as to the proper law in the case; therefore, this Federal Question of denying Mrs. Skinner due process of law in violation of the 14th Amendment could not be raised until after it occurred on February 9, 1977. Also the denial of Mrs. Skinner the benefit of Louisiana Law by denying her equal protection under Louisiana Law and denying her the benefit of Louisiana Law did not take place until February 9, 1977 when the Supreme Court refused to correct the errors of law committed by the lower courts, and therefore, she could not complain of the Federal violation until after it had occurred on February 9, 1977. It is no

less,a Federal Question and a violation of her rights under the Federal Constitution; the 5th and 14th Amendments; even-tho it did not become a Federal Question until the final action by the Supreme Court in approving all of the legal errors committed by the Courts below. Mrs. Skinner requested and demanded that each Court grant her the benefit of law, but was denied benefit of Louisiana Law by each Court.

REASONS RELIED ON FOR THE
ALLOWANCE OF THE WRIT

I. THE STATE OF LOUISIANA, ACTING THROUGH ITS JUDICIARY, VIOLATED THE U. S. CONSTITUTION, AMENDMENTS, FIFTH AND FOURTEENTH, BY:

1) Denying Mrs. Skinner equal protection of the law;

2) Denying her due process of law;

3) Permitting the taking of her property without just compensation in view of the following acts by the Courts:

(A) ALTHOUGH THE FEDERAL GOVERNMENT REQUIRED SAFETY PROVISIONS TO BE PLACED IN THE CONTRACT (see Exhibit P-7) WHICH READ AS FOLLOWS:

"VIII. SAFETY; ACCIDENT PREVENTION: IN THE PERFORMANCE OF THIS CONTRACT, THE CONTRACTOR (T. L. JAMES & CO., INC.) SHALL COMPLY WITH ALL APPLICABLE FEDERAL, STATE AND LOCAL LAWS GOVERNING SAFETY, ... THE CONTRACTOR SHALL PROVIDE ALL SAFEGUARDS, SAFETY DEVICES AND PROTECTIVE EQUIPMENT AND TAKE ANY OTHER NEEDED ACTIONS, ON HIS OWN RESPONSIBILITY, OR AS THE STATE HIGHWAY DEPARTMENT CON-

TRACTING OFFICER MAY DETERMINE, REASONABLY NECESSARY TO PROTECT THE LIFE AND HEALTH OF EMPLOYEES ON THE JOB AND THE SAFETY OF THE PUBLIC AND TO PROTECT PROPERTY IN CONNECTION WITH THE PERFORMANCE OF WORK COVERED BY THIS CONTRACT"; AND ALTHOUGH THE LOUISIANA LAW PROHIBITED THE TRUCKS FROM BRINGING THE SAND AND GRAVEL TO THE T. L. JAMES JOB IN OVERLOADED TRUCKS AND IN SPITE OF THE HOLDING BY THE JURY IN THIS CASE THAT THE OVERLOADING OF THE TRUCK WHICH KILLED SKINNER WAS A PROXIMATE CAUSE OF HIS DEATH; IN SPITE OF THE FACT THAT T. L. JAMES HAD KNOWLEDGE OF THE OVERLOADING OF THE TRUCKS BY THE DEFENDANT, MATERIALS TRANSPORT, INC., FOR THE PREVIOUS 18 MONTHS, THE COURT OF APPEAL OF LOUISIANA ERRONEOUSLY HELD THAT T. L. JAMES DID NOT HAVE A DUTY TO PREVENT AND STOP THE OVERLOADING OF THE TRUCKS BY MATERIALS TRANSPORT, INC., IN BRINGING SAND AND GRAVEL TO ITS JOBSITE AND IGNORED THE CONTRACT PROVISIONS ABOVE QUOTED AND THE LAW

OF LOUISIANA WHICH PLACED SAID DUTY UPON T. L. JAMES AND COMPANY, INC.

In authorizing the construction of the interstate highway system in the U S and particularly in Louisiana with 90% Federal funds, Congress at no time intended that prime contractor, T. L. James and Co., who under its bid to perform this work at substantial gross profits included in the cost of the job should do business with irresponsible subcontractors, including suppliers and haulers of sand and gravel to the job such as Materials Transport, Inc., or Mallard Truck Lines, Inc., which in this case were both irresponsible in that they deliberately violated the State Law which brought on the death of Mr. Skinner and they deliberately operated without sufficient finances to pay the losses that they caused through their negligence and illegal operations such as overloading the truck which caused the death of Mr. Skinner; and so the prime contractor took on irresponsible persons to help in carrying on the project which was contrary to the intent, spirit and expressed wording of the con-

tract which was authorized between the Department of Highways, through the Department of Transportation of the U. S. Government, and with T. L. James and Co., the prime contractor on the job.

The purchase order which T. L. James and Co., is hiding behind as a shield to protect it from being liable in this case to the plaintiff, Mrs. Skinner, was issued to Feliciana Sand and Gravel Company, whose manager permitted Materials Transport, Inc., acting through its president and sole owner, H. Allen Thomason, to deliver part of the sand and gravel to the project in question for T. L. James and Co., the prime contractor; but only could Materials Transport bring sand and gravel to the job with the expressed approval and consent of T. L. James and Co. through its superintendent. This permission to bring sand and gravel to the job granted by T. L. James and Company, to Materials Transport, Inc., could at any time be withdrawn by T. L. James and Co., and particularly, it was the duty of T. L. James and Co., to withdraw this permission granted Materials Transport when from the very start Materials

Transport, Inc., began hauling sand and gravel to the job in overloaded trucks in violation of the State Law of Louisiana.

Thus, the contract provision above quoted which was placed in the contract at the request of the Federal Government,through the Department of Transportation, as authorized by Congress, placed a plain and absolute duty on the part of T. L. James and Company, Inc., to prevent Materials Transport from violating the State Law in overloading the trucks when it brought sand and gravel to the project in question. The records reveal that Materials Transport overloaded its truck so that the weight load averageó from 96,000 pounds to 110,000 pounds, wherein the legal load limit never exceeded approximately 72,000 pounds; the Court and trial jury found that the overloading of the truck to 100,000 pounds was the proximate cause of the death of Mr. Skinner; therefore, clearly T. L. James and Co., violated the duty it had toward Mr. Skinner, to prevent the trucks operated by Materials Transport, Inc., with

permission of T. L. James and Co., Inc., (acting through its superintendent) from overloading its trucks and from violating the State Law; and since T. L. James violated this duty it had toward James Skinner, the State of Louisiana acting through its judiciary, should have held T. L. James and Co., Inc., liable to the decedent, James Skinner's widow, Mrs. Mable Skinner, petitioner herein.

The Court of Appeal of Louisiana with the approval of the Supreme Court of Louisiana held that contrary to the law of Louisiana and in spite of the Federally written safety provisions, T. L. James and Company did not have a duty toward Skinner to prevent the overloading of the trucks as was done in this case by Materials Transport with the full knowledge and continued consent of T. L. James and Co., over a period of 18 months before Mr. Skinner was killed because of an overloaded sand truck bringing sand to T. L. James and Company project.

Had the prime contractor, T. L. James and Co., taken the action needed on its own responsibility, the prime contractor, T. L. James would have

stopped the gross overloading of the sand and gravel trucks of Materials Transport in bringing sand to the job whose truck wrongfully killed plaintiff's husband due to the illegal overloading. T. L. James failed to stop the overloading of the trucks because it benefitted financially from the overloading. Allen Thomason testified that if he was not allowed to overload his trucks, he would have had to increase the price of sand. The contractor, T. L. James had indeed knowledge both actual and constructive, since the trucks were weighed on scales owned and operated by agents of T. L. James and Company. If the contractor, T. L. James would have followed the intent of Congress and the Department of Transportation of the United States Government followed the provisions in a contract for accident prevention, the death of Mr. Skinner would never have occurred.

In the recent case of Smith v. United States, 497 F. 2d 500 (1974), the 5th Circuit Court of Appeals in deciding a case involving an industrial explosion which was caused through the negligence of

a contractor that had signed an agreement to enforce safety provisions similar to the clause found in the T. L. James and Co., Inc., contract. In that case the Court held:

> "In addition, the United States inspector had knowledge of the methods of signaling actually used and the dangerous incident thereto. He had the power to rectify same, but did not do so."

This is similar to the position that T. L. James was found to have in this case at bar. T. L. James had the actual knowledge of the overloading of the trucks and the danger incident thereto, in addition, it had the power to rectify the dangerous condition. T. L. James had given permission to Materials Transport and its owners to bring sand and gravel and likewise permitted them to overload their trucks in violation of the State Law because the trucks were overloaded for a period of 18 months prior to the truck killing Skinner in this case. But, T. L. Jmaes and Co., although they had a duty to prevent violations of law that would bring unsafe conditions to the public, it failed

to stop the overloading of the sand trucks in this case which caused the death of Mr. Skinner.

In the case at bar, T. L. James and Company was under an absolute affirmative duty to comply with "Safety: Accident Prevention Clause" and to insure the safety of the public in connection with the performance of the work covered by the contract and to prevent its suppliers, Materials Transport, Inc. from violating the State Law in overloading its trucks. This affirmative duty was breached by T. L. James and Company when it in fact had actual knowledge of gross overloading of the sand and gravel truck and failed to rectify or to take steps to prevent the overloaded trucks from delivering the sand and gravel to the jobsite. This action of the State of Louisiana acting through its Judiciary amounted to a denial of Due Process of Laws to Mrs. Skinner.

(B) IT WAS ERROR OF LAW FOR THE TRIAL COURT TO REFUSE TO GIVE THE PROPER LAW AND ADEQUATE INSTRUCTIONS AS TO THE LAW TO THE JURY IN THIS CASE ALTHOUGH REQUESTED BY PLAINTIFF IN

SPECIAL INSTRUCTIONS NUMBER 8 and 9 to 32; AND IT WAS ERROR OF LAW FOR THE COURT OF APPEAL TO REFUSE TO APPLY THE LOUISIANA LAW AS DECREED BY THE SUPREME COURT OF LOUISIANA REQUIRING THE COURT OF APPEAL TO ACCEPT THE TESTIMONY OF THE DEFENDANTS WHO WERE PARTIES TO THE ISSUANCE AND RECEIVING OF THE PURCHASE ORDER IN QUESTION AS TO THEIR RIGHTS AND OBLIGATIONS UNDER THE PURCHASE ORDER; AND THE COURT OF APPEAL COMMITTED ERROR WHEN IT STATED THAT IT DID NOT BELIEVE MR. SPOHRER OF T. L. JAMES; MR. JOHNSTON AND MR. THOMASON; ALL DEFENDANTS; AND IT WAS ERROR OF LAW FOR THE COURT OF APPEAL IN REFUSING TO HOLD THAT T. L. JAMES AND COMPANY, COULD TERMINATE THE SERVICES OF MATERIALS TRANSPORT, INC., MALLARD TRUCK LINES, INC., OR HAULING, INC., AT ANY TIME WITHOUT THE PARTIES HAVING RECOURSE, IN VIEW OF THE LAW OF LOUISIANA; HAD MRS. SKINNER BEEN GIVEN THE BENEFIT OF THE LOUISIANA LAW, THE COURT OF APPEAL WAS REQUIRED TO HOLD T. L. JAMES AND CO., LIABLE TO

MRS. SKINNER FOR ALL OF HER LOSSES SINCE UNDER EXISTING LAW OF LOUISIANA THE COURT OF APPEAL WAS BOUND TO HOLD THAT MATERIALS TRANSPORT, INC., ITS DRIVER, LACOMBE, MALLARD TRUCK LINES, INC., AND/OR HAULING, INC., WERE ALL SERVANTS OF T. L. JAMES AND CO., INC., AND ITS FAILURE TO SO HOLD IN EFFECT DENIED MRS. SKINNER THE BENEFIT OF LOUISIANA LAW.

All of the parties to the purchase order, Mr. Henry Spohrer for T. L. James, Mr. H. Allen Thomason, for Mallard Truck Lines and Materials Transport, and Mr. Henry Johnston for Feliciana Sand and Gravel and Hauling, Inc., all testified that T. L. James and Co., acting through the superintendent, Henry Spohrer, or Feliciana Sand and Gravel acting through its manager, Mr. Henry Johnston, could terminate the employment of Materials Transport, Mallard Truck Lines, and/or Hauling, Inc., at any time without recourse by the corporations. This indicates under Louisiana Law a relationship of master/servant or employer/employee

existed between T. L. James and Materials Transport, (or Hauling, Inc.) rather than an independent contractor/contractor relationship. The relationship that existed was one of master and servant, or principal and agent, rather than one of contractor and independent contractor. T. L. JAmes and Co., retained the ultimate control in having the right to terminate at any time without any liability for breach of contract. Because T. L. James and Co., could terminate the relationship at any time, and because Hauling, Inc., or Materials Transport could terminate the relationship at any time, it is akin to a contract of employment for an indefinite period of time as held by Garner v. Louisiana State Board of Education at 277 So.2d 492 and Pechon v. National Corporation Service at 100 So.2d 213, Hickman v. Southern Pacific Transport Co., 262 So.2d 385, Landry v. American Surety Co., of New York, 149 So.2d 738.

The relationship cannot be one of contractor-independent contractor, because there was a right to terminate without cause, and there was no term of

employment and there was a right to supervise and control by T. L. James and Co. It is for this reason that plaintiff urges that T. L. James and Company is not a contractor in relationship with an independent contractor. It was, therefore, an error for the jury to fail to hold T. L. James and Company liable for the death of Mr. Skinner, in view of the master/servant relationship existing between T. L. James and Materials Transport, Inc., and Hauling, Inc.

The Trial Court denied to Mrs. Skinner the benefit of this relationship by inadequately instructing the jury, so that it could not make a correct decision in that T. L. James and Co., and Materials Transport, Inc., and its driver had a master-servant relationship.

The Court of Appeal erred in not applying the law which was controlling in the case at bar; when the Supreme Court of Louisiana approved this error; the State of Louisiana through the Judiciary has denied Mrs. Skinner due process of law, in violation of 14th Amendment of United States Constitution.

The Appellate Court did this by

ignoring the testimony of the parties involving the transaction regarding the purchase order in violation of Supreme Court decisions. The Louisiana State Supreme Court held in the case of B. Segall Co. v. Trahan, 290 So.2d 854, that:

> "uncontradicted testimony by president of contracting company...as to business transaction between parties, and as to interpretation of the contract, must be accepted as true."

This recent case was simply an affirmation of the principles established by years of jurisprudence. Olds v. Ashley, 250 La. 935; 200 So.2d 1 (1967); Ruthardt v. Tennant, 252 La. 1041; 215 So.2d 805 (1968); Campo v. LaNasa, 173 So.2d 365; Cole v. Central Contracting Company, 5 La. App. 513 (1926).

At page 7 of the opinion by the Appellate Court, the Court states:

> "Though there are statements in the record by witnesses (actually parties to the transaction and all defendants) for both sides that they were of the opinion that their relationship was terminable at will, (this was the parties interpretation, not an opinion) we are convinced

that it was not. When T. L. James issued the purchase order for so many yards of sand and gravel to be delivered at a certain price, to a particular sand and gravel hauler, it committed itself to purchase the sand and gravel under the terms of the purchase order."

(Even if there was a valid agreement, it was issued to Feliciana Sand and Gravel Co., and not binding on Materials Transport, Inc., or Hauling, Inc., which were not named in the purchase order; and were acting only with a permission from T. L. James and Company who had the right to withdraw it at any time.)

The Appellate Court not only ignored the Louisiana Law on master/servant; but by not accepting the testimony of the parties to the transaction it created facts that did not exist, which had the effect of relieving T. L. James and Company of liability. This was a clear denial by the court to Mrs. Skinner of due process of law, by refusing to abide by the rules as established by the Louisiana Supreme Court.

This is in violation of a sense of fundamental justice which creates a de-

nial of due process to Mrs. Skinner in violation of the 14th Amendment.

(C) THAT THE JUDICIARY DENIED MRS. SKINNER THE RIGHT OF JURY TRIAL; AFTER SHE WAS AUTHORIZED TO HAVE HER CASE TRIED BY JURY; THEN, THE TRIAL COURT REFUSED TO PROPERLY AND ADEQUATELY INSTRUCT THE JURY AS TO THE LAW; REFUSED TO ACCEPT THE CHARGES PRESENTED TO THE COURT ON BEHALF OF THE PLAINTIFF, MRS. SKINNER, AND REFUSED TO CHARGE THE JURY AS TO THE LAW DEFINING INDEPENDENT CONTRACTOR, MASTER SERVANT RELATIONSHIP IN A WAY THAT THE JURY COULD TAKE THE FACTS AND THE PROPER LAW AND CORRECTLY HOLD T. L. JAMES AND COMPANY, INC., THE MASTER OR EMPLOYER OF MATERIALS TRANSPORT, INC., MALLARD TRUCK LINES, INC., AND/OR HAULING, INC., AND RODERICK W. LACOMBE; AND THE COURT OF APPEAL AND THE SUPREME COURT ERRED AS A MATTER OF LAW IN FAILING TO CORRECT

THE ERRORS OF THE TRIAL COURT, WHICH FAILED TO GIVE THE JURY THE PROPER INSTRUCTIONS AS TO THE LAW IN THIS CASE; AND IN FAILING TO APPLY THE STATE LAW TO THE CASE WHICH WOULD BENEFIT MRS. SKINNER, IN DECIDING THE CASE ON THE MERITS, ALL OF WHICH ERRORS BEING SO COMPOUNDED WITH EACH OTHER THAT THEY ACTUALLY AMOUNTED TO DENYING DUE PROCESS TO MRS. SKINNER AND THEREFORE, PRESENTS A FEDERAL QUESTION.

One of the major contentions of Mrs. Skinner in the case at bar was that Materials Transport and Mallard Truck Lines were in fact subcontractors or employees of T. L. James and by Federal Law or by State Law. The Trial Court instructed the jury as follows:

> "Now the responsibility of the individual defendants in this case varies according to their status which has been established by Louisiana Law. It is your responsibility to determine from these facts the status each of the defendants may have occupied with the relationship to other defendants."

> "Generally, an employer is liable for the tort or negligent injury committed by his employee if, at the time, the employee is acting within the scope of his employment.
>
> "One of the primary elements of agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent, and the power of the agent to act for the principal ....
>
> "Whether one occupies the status of a subcontractor or supplier of materials depends solely upon the facts which you, the jury, determine. A prime or principal contractor is one who contracts to perform work on large scale, whereas a subcontractor means one who takes from a principal contractor a specific part of the work and does not normally include laborers or material men. Generally, the task of whether a supplier of materials is a subcontractor is whether the person furnishing the material thereafter performs any labor and attaching the materials with the construction." (See Interrogatory No. 14 to the Jury)

The Trial Court erred in not giving the jury the benefit of plaintiff's instructions, specifically the instruction which contained the following language

concerning the independent contractor relationship:

> "You are instructed that the right to terminate the relationship without cause, where no term of employment is prescribed is characteristic of the master/servant or employer/employee relationship is at the same time antagonistic to the independent contractor relationship." (whis was fatal to the plaintiff, since the Court did not define Independent Contractor for the Jury).

This language is taken from the Louisiana case of Hickman v. Southern Pacific Transport Company, 262 So.2d 385, and more applicably states the law concerning the independent contractor relationship.

The Trial Court failed to instruct the jury concerning the law contained in 41 CFR 1-7.102-1 which reads as follows:

> "(c) Except as otherwise provided in this contract the term subcontracts includes purchase orders under this contract."

In the recent case of Ballew v. Susver, 320 F. Supp. 1233, the Court held:

> "Without basic instructions submission [of the case] to the jury would be farce. The right to a jury trial under State Law embraces the right to have the jury properly instructed as to the Law of the case.
>
> A State Trial Judge is required to give correct and adequate instructions as to the governing law, irrespective of whether he is requested to do so; in certain circumstances gross omissions from a charge may amount to a violation of due process." U S v. La. 70 S. Ct. 914

This Honorable Court in the case of Snyder v. Commonwealth of Massachusetts, 54 S. Ct. 330, held:

> "The States are free to regulate court procedure in accordance to their own concept of fairness unless some fundamental principles of justice is violated." 91 S. Ct. 1987, 93 S. Ct. 737, 94 S.Ct. 402

And in two cases before the Supreme Court, Jacob v. New York, 315 U.S. 752, 62 S.Ct. 854 and Baylis v. Travelers Insurance Company, 113 U.S. 316, 5 S.Ct. 494, this Honorable Court held:

> "The right to a jury trial in civil cases at common law, whether guaranteed by the Constitution or statute, should be jealously guarded by the Courts."

And in the case Demick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, this Honorable Court used the languate that:

> "Any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."

In Fay v. People of New York, 332 U.S. 261, 67 S.Ct. 1613, this Honorable Court held:

> "The function of the Supreme Court under the 14th Amendment in reference to State juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever means the State sees fit to employ."

In this case the State saw fit to employ the jury trial system but because the jury was so inadequately instructed as to the law of the case the right to the jury trial was effectively taken away from Mrs. Skinner in violation of the 14th Amendment because it denied her the due process of law. The Louisiana Law granting the right to a trial by jury is found in the Code of Civil Procedure Articles 1731 and 1732 and states as follows:

> "Art. 1731. Except as limited by Article 1733, the right of trial by jury is recognized.
>
> The nature and amount of the principal demand shall determine whether any issue in the principal or incidental demand is triable by jury."
>
> "Art. 1732. A party may demand a trial by jury of any issue triable of right by a jury in a pleading filed not later than ten days after the service of the last pleading directed to such issue."

Mrs. Skinner demanded and received a trial by jury. At the trial level the jury was improperly instructed as to the law regulating the various relationships between the principal contractor and the organizations and corporations. These instructions were complained of at the appellate level, the Court of Appeal ignored this contention by stating as follows:

> "As to the specification of error concerning the Trial Judge's instructinons to the jury, we are of the opinion that in light of the Supreme Court's decision of Gonzales v. Xerox Corp., 320 So. 2d 163 (La.1975), there is no

need for us to determine whether the Trial Judge was in error or not. Even if we would find the Trial Judge in error, under the holding of Gonzales, supra, rather than remanding for a new trial, we are compelled to render a decision."

The effect of this decision is that the plaintiff is denied the right to have the facts decided by the jury, if, as in this case, the Court of Appeal will not remand the case for a new trial and at this same time make new and more serious errors. The legislature did not intend the Courts to deny a jury trial to a party litigant, in fact, the Court of Appeal, with the approval of the Supreme Court denied "due process of law" by denying the jury the applicable law governing the rights and duties of the parties.

Your Honors should review the actions of the State Courts and act to protect the integrity of the jury trial as provided and guaranteed by Louisiana Law.

As Your Honors are aware that the right to a trial by jury is one of the most closely guarded rights in Federal

Courts. But in this particular State Court case the demand for a jury trial was treated lightly. Mrs. Skinner requested a jury to decide the facts on which she based her claim for damages. The jury was inadequately and improperly instructed as to the applicable law. The Court of Appeal ignored the errors committed by the Trial Court, then proceeded to make new and more serious errors by its decision. The Supreme Court of Louisiana allowed this denial of the basic right to a jury trial to continue.

Your Honors must grant a review herein and require the Louisiana Judiciary to honor the integrity of a Civil Jury Trial.

II. SINCE THE FEDERAL GOVERNMENT, THROUGH CONGRESS, INITIATED AND FINANCED 90% OF THE INTERSTATE HIGHWAY SYSTEM, AUTHORIZED THF DEPARTMENT OF TRANSPORTATION OF THE U S GOVERNMENT TO USE THE STATE OF LOUISIANA THROUGH THE DEPARTMENT OF HISHWAYS AS ITS AGENT IN CONSTRUCTION OF INTERSTATE HIGHWAY SYSTEM,

BUT RETAINED CONTROL OVER IT BY APPROVING PLANS, DESIGN, ROUTE, BIDDING, APPROVAL OF CONTRACTS TO BUILD, RETAIN RIGHT TO INSPECT AS CONSTRUCTED AND MUST APPROVE THE COMPLETED HIGHWAY, BEFORE ACCEPTED AND PAID FOR BY THE GOVERNMENT, THE CONTRACT OF T. L. JAMES AND COMPANY WITH THE DEPARTMENT OF HIGHWAYS, WHICH WAS APPROVED BY THE DEPARTMENT OF TRANSPORTATION OF THE U. S. GOVERNMENT, MUST BE CONTROLLED BY FEDERAL LAW AND IT WAS ERROR FOR THE STATE COURTS OF LOUISIANA TO FAIL TO APPLY FEDERAL LAW IN THE APPLICATION OF THE CONTRACT OFFERED IN EVIDENCE AS P-7.

This Writ should be granted as a matter of law to reverse the decision of the Louisiana Supreme Court and the Court of Appeal, First Circuit, and the Trial Court in that said court refused to enforce the provision of the contract signed by T. L. James and Company, Inc., with the Louisiana Department of

Highways, which required T. L. James and Company, Inc., to insure the subcontractors and as such insured Materials Transport, Inc., Mallard Truck Lines, Inc., and Hauling, Inc., to the amount of Two Hundred Thousand Dollars since the special provision of the contract located at page 33 of the contract (extracts of same reproduced herein as Exhibit "E" of the Appendix) contained an insurance clause which reads as follows:

> "INSURANCE: IN addition to any other forms of insurance or bonds required under the terms of the contract and specifications, the contractor will be required to carry insurance of the following kind and amounts:
>
> 1) CONTRACTOR'S PUBLIC LIABILITY AND PROPERTY DAMAGE LIABILITY INSURANCE.
>
> The contractor shall furnish evidence to the Department that with respect to the operations he performs he carries regular Contractor's Public Liability insurance providing for a limit of not less than Two Hundred Thousand Dollars for all damages arising out of bodily injuries or death of one person....
>
> If any part of the work is sublet,

similar insurance shall be provided by or in behalf of the subcontractors to cover their operations."

The District Court and the Court of Appeal for the State of Louisiana refused to interpret this section of the contract by the Code of Federal Regulations which states at 41 CFR 1-7.101-1:

"(c) Except as otherwise provided in this contract, the term "subcontract" includes purchase orders under this contract."

If the Courts had followed the Code of Federal Regulations then the purchase order signed by T. L. James and Co., and sent to Feliciana Sand Gravel would have controlled the actions of Materials Transport, Mallard Truck Lines and Hauling, Inc. Thus, T. L. James would have been required to insure the negligent acts of the employee of the hauling corporation, Roderick W. Lacombe.

It was erroneous for the Courts of the State of Louisiana to refuse to interpret the contract provisions by Federal Law since the Federal Government provided 90% of the funding and required

certain provisions be placed in the contract.

In the alternative, if the State Law is found controlling on this particular issue, the State Courts refused to give Mrs. Skinner equal protection of the State Law as will be explained as follows.

Under the Louisiana law of contracts as found in the Civil Code of the State of Louisiana Article 1901 states as follows:

"Agreements legally entered into have the effect of law on those who formed them. They cannot be revoked, unless by mutual consent of the parties, or for causes acknowledged by law.

They must be performed with good faith."

This article read in conjunction with

Article 1902 which states as follows:

"But a contract, in which anything is stipulated for the benefit of a third party, who has signified his assent to accept it, cannot be revoked as to the advantage stipulated in his favor without his consent."

In the case at bar the stipulation in

favor of the third party was the insurance provision contracted with the State of Louisiana to provide for insurance to Materials Transport, Inc., Mallard Truck Lines, Inc., and Hauling, Inc., which was for the benefit of the general public using the highways. Mr. Skinner was using the highways when his car was crushed by the overloaded truck operating for the benefit of the contractor, T. L. James. If this contract would have been carried out with good faith T. L. James and Company would have either provided insurance for Materials Transport, Inc., Mallard Truck Lines and Hauling, Inc., or would have required the hauling servants to carry insurance in the amount of Two Hundred Thousand Dollars.

Since the judgment rendered by the Trial Court was in favor of Mrs. Skinner and against Materials Transport and Mallard Truck Lines, these two bankrupt companies have not compensated Mrs. Skinner for the loss of her husband and cannot do so for lack of funds.

The jurisprudence has long held that a right of action is a property right falling within the protection

offered by the 14th Amendment of the United States Constitution. In the case of Lamb v. Powder River Livestock Company, 132 F. 434, the court held:

> "A right of action which springs from contract is property within the protection of this [14th] Amendment."

In Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576, the Court held that:

> "A right of action by one injured as a result of negligence of another against the negligent party to recover damages sustained by reasons of such injury is "property" within the protection of this [14th] Amendment."

In U. S. v. Northern Pacific Railroad Co. 41 S.Ct. 439; Godchaux Company v. Estopinal, 83 So. 690; and Simpson v. Stanten 193 S.E. 64, the Courts have held:

> "As used in various guarantees against taking of property without due process of law, the term "property" is used in the most general sense as embracing everything over which a man may have exclusive control or dominion; and it has been held broad enough to embrace all charac-

ter of vested rights whether or not they may be technically called property rights."

And finally by Louisiana Law Article 2315 of the Louisiana Civil Code the applicant's right of action is defined as property therein as follows:

> ". . . the right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of decease in favor of: 1) the surviving spouse. . . .
>
> A <u>right to recover damages</u> under the provisions of this paragraph <u>is a property right</u> which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not."

Thus, the State Court's action in refusing to hold T. L. James and Company liable for Mr. Skinner's death denied Mrs. Skinner just compensation for the death of her husband by not requiring T. L. James and Company to be insurer of its subcontractors, Materials Transport, Inc., Mallard Truck Lines and

Hauling, Inc., which T. L. James and Company was obligated to be by the terms of the contract. The Louisiana Judiciary allowed T. L. James and Co., to reap the benefits of using these bankrupt corporations to overload their trucks which did not carry liability insurance; thus, making an additional profit on the project at the expense of the general public in violation of the Congressional and Federal mandate and the State Department of Highway mandate under the safety provisions of the contract that the public be protected by the contractor providing liability insurance in the amount of not less than $200,000.00.

The Louisiana judiciary in denying a judgment against T. L. James and Co., acquiesced in and permitted the contractor in going free of paying the claim of damages for the death of her husband, Mr. James Skinner, which it legally owed, thus is denying her just compensation in violation of the constitution, the mandate by Congress, and the mandate by the State Department of Highways through the contract executed by T. L. James and

Company, with the department and in relegating Mrs. Skinner to try to recoup her great losses from two bankrupt corporations, Materials Transport, Inc., and Mallard Truck Lines, Inc., both servants and agents of T. L. James and Co., Inc. If T. L. James and Company, Inc., is not required to pay Mrs. Skinner her great monetary losses, a great injustice will remain unrectified.

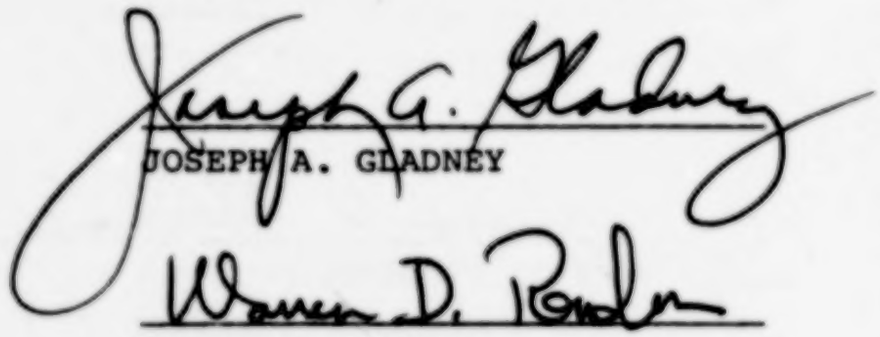
The State of Louisiana, acting through its Judiciary, has, as shown above, denied Mrs. Skinner due process of law which amounts to taking her property without Just Compensation in violation of the 5th and 14th Amendments of the United States Constitution.

IN CONCLUSION

The petition for a Writ of Certiorari should be granted. Otherwise, the effect of this case would allow the courts to usurp the prerogative of the legislature to assure party litigants a right to a trial by jury. This ruling will give the power to a trial judge to misdirect a jury to the point where it

is no longer the decider of "fact" under proper Louisiana Law, as contemplated by our Legislature in granting the right of Trial By Jury. The ultimate effect of this case is that the courts by denying recovery from T. L. James which received sufficient money from Congress to cover all expenses and losses of the construction project, have cast Mrs. Mable Skinner into poverty, welfare and worst of all a distrust of the Courts; which should promote integrity and God's righteousness rather than the distrust by the litigants.

Respectfully Submitted,



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C E R T I F I C A T E

I hereby certify that a copy of the foregoing has been mailed this date, postage prepaid, to all counsel of record: Ben W. Lightfoot, Suite 614, 451 Florida Boulevard, Baton Rouge, La., 70801; Henry D. Salassi, Jr., 701 Fidelity National Bank Bldg., Baton Rouge, La. 70801; Frank M. Coates, Jr., 451 Florida Blvd., Baton Rouge, La. 70801; and William C. Kaufman, III, 8225 Florida Boulevard, Baton Rouge, La., 70815; Also to the Supreme Court of Louisiana and the Court of Appeal, First Circuit, State of Louisiana, on this 6th day of May, 1977.

JOSEPH A GLADNEY

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

MRS. MABLE SKINNER — EXHIBIT "A"

v. — February 9, 1977

MALLARD TRUCK LINES, INC., ET AL — NO. 59,107

In Re: Mrs. Mable Skinner, applying for Certiorari, or writ of review, to the Court of Appeal, First Circuit, Parish of E. Baton Rouge.

Writ denied. The result is correct.

/s/ WFM

/s/ JWS

/s/ FWS

/s/ AT, Jr.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
February 9, 1977

/s/ Phil Trice
Deputy Clerk

EXHIBIT "B"

TRINITY UNIVERSAL INSURANCE COMPANY

v.

MALLARD TRUCK LINES, INC., et al.

Mrs. Mabel SKINNER

v.

MALLARD TRUCK LINES, INC., et al.

Nos. 11057, 10993.

Court of Appeal of Louisiana, First Circuit.

Nov. 15, 1976.

Rehearing Denied Dec. 20, 1976.

Widow of deceased motorist brought wrongful death action against owner of other truck involved in collision, lessee of other truck, owner's insurer and others, and workmen's compensation carrier of deceased motorist's employer intervened and filed independent suit which was consolidated for trial seeking to recover amount of compensation paid. The Nineteenth Judicial District Court, Parish of East Baton Rouge, Lewis S. Doherty, III, J., entered judgment for widow and workmen's compensation carrier, and widow and carrier appealed. The Court of Appeal, Lottinger, J., held that sand and gravel haulers were independent contractors, and driver of sand and gravel truck involved in collision was not a borrowed employee of prime contractor in charge of highway project; that neither prime contractor in charge of highway project, nor owner of trucks used for hauling sand and gravel for project, nor previous hauler of sand and gravel under purchase order had duty to stop the overloading of sand and gravel trucks or to refuse delivery; that prime contractor was not required to provide insurance for suppliers of materials; and that award of $123,000 to widow was not so conservative as to constitute abuse of discretion.

Affirmed.

1. Automobiles ⇐197(1)

Where prime contractor in charge of highway project was committed to purchase of sand and gravel under purchase order, prime contractor instructed haulers of sand and gravel to build stockpile of sand and gravel at specified location, but did not exercise any control over routes to be taken by sand and gravel trucks, frequency of deliveries, or which drivers could deliver, sand and gravel haulers were independent contractors, and driver of sand and gravel truck involved in collision was not a borrowed employee of prime contractor.

2. Highways ⇐113(4)

Where neither prime contractor in charge of highway project, nor owner of trucks used for hauling sand and gravel for project, nor previous hauler of sand and gravel under purchase order had any direct control over the loading of sand and gravel for highway project, such parties had no duty to stop the overloading of trucks or to refuse delivery.

3. Highways ⇐113(1)

Where general contract for highway project was entered into by state agency, rather than federal agency, interpretation of terms used in contract would be controlled by applicable state law rather than federal law, irrespective of fact that federal monies were being used partly for funding of contract.

4. Insurance ⇐104(3)

Where general contract for highway project required prime contractor to carry certain amount of public liability and property damage insurance and to provide similar insurance for subcontractors, but contract contained no definition of "subcontractor," prime contractor was not required to provide insurance for supplier of materials.

5. Death ⇐97

Award of $123,000 to widow whose husband was killed in motor vehicle accident was not so conservative as to constitute abuse of discretion, notwithstanding expert testimony to the effect that widow's economic loss alone was $120,491.

BEST COPY AVAILABLE

William C. Kaufman, III, Baton Rouge, for plaintiff-appellant Trinity Universal Ins. Co.

Ben F. Lightfoot, Baton Rouge, for defendant-appellee Mallard Truck Lines, Inc., and others.

Joseph A. Gladney, Frederick A. Blanche, III, Baton Rouge, for plaintiff-appellant Mrs. Mabel Skinner.

Henry D. Salassi, Jr., of Breazeale, Sachse & Wilson, Baton Rouge, for defendant-appellee Feliciana Sand & Henry E. Johnston, Ind.

Frank M. Coates, Jr., Michael Dufilho, Baton Rouge, for appellee T. L. James Co., and others.

Before SARTAIN, COVINGTON and LOTTINGER, JJ.

LOTTINGER, Judge.

This is a wrongful death action filed by Mrs. Mabel Skinner, widow of James M. Skinner who died as a result of an automobile-truck collision. From a judgment in favor of the plaintiff, and against Mallard Truck Lines, Inc. (sometimes hereinafter referred to as Mallard), Materials Transport, Inc. d/b/a Southeastern Materials Company (sometimes hereinafter referred to as Materials and/or Southeastern), and Employers Commercial Union Insurance Company (sometimes hereinafter referred to as Employers) in the sum of $123,000.00, but limiting the amount of the judgment against Employers to its policy limits of $5,000.00, the plaintiff has appealed.

In addition, Trinity Universal Insurance Company (hereinafter sometimes referred to as Trinity), the workmen's compensation insurance carrier of Mr. Skinner's employer filed an independent suit as well as intervening in this suit for recovery of the amount of compensation paid as well as those sums that Trinity may be obligated to pay in the future. Consolidation was had for trial below, the intervention being tried by the jury and the independent suit by the judge alone. From a judgment in favor of Trinity and against Mallard, Materials, and Employers in the amount of $11,192.00, as well as all sums paid in the future under the Louisiana Workmen Compensation Act, with the judgment against Employers being limited to the $5,000.00 policy limits, and that said judgment be paid prior to the award in favor of Mrs. Mabel Skinner, Trinity has appealed. Both of these appeals have been consolidated and will be handled in this opinion, but separate judgments will be rendered.

Mrs. Skinner in filing this wrongful death action named various individuals and corporations, as well as the State of Louisiana through the Department of Highways as defendants, to wit: Roderick W. Lacombe, driver of the truck which collided with the car the decedent was operating, and later dismissed by agreement; Mallard Truck Lines, Inc., owner of the truck operated by Lacombe; H. Allen Thomason, principal stockholder or sole owner of Mallard Truck Lines, Inc. and Materials Transport, Inc. doing business as Southeastern Materials Company; Louisiana Sand & Gravel Company of Baton Rouge, Inc., later dismissed by motion of both plaintiff and intervenor; Kenny L. Riley, later dismissed on a motion for summary judgment; Feliciana Sand & Gravel Company, Inc. (hereinafter sometimes referred to as Feliciana); Hauling, Inc.,; Henry Johnston, principal stockholder and sole owner of Feliciana Sand & Gravel Company, Inc. and Hauling, Inc.; T. L. James & Company, Inc. (sometimes hereinafter referred to as T. L. James); State of Louisiana, through the Department of Highways, later dismissed on a motion for summary judgment; Highland Insurance Company, insurer of T. L. James; Employers Commercial Union Insurance Company, insurer of Mallard; General Motors Corporation, later dismissed on a motion for summary judgment; Capitol Mack, Inc., later dismissed on a motion for summary judgment; G.M.C., Inc., later dismissed on a motion for summary judgment; and Mate-

rials Transport, Inc., doing business as Southeastern Materials Company. Trinity basically sued the same defendants, though not all of them, and in addition named Fidelity and Casualty Company of New York as a defendant.

The record points out that on March 13, 1972, the decedent, James M. Skinner, while employed by Arrow Tobacco Company, and while on company business, was driving on Hooper Road, north of Baton Rouge, when he was involved in a head-on collision with a large gravel truck operated by Lacombe, owned by Mallard, but leased to Southeastern. The head-on collision took place in Skinner's lane of travel. There seems to be no question as to the cause of the death of Mr. Skinner as well as the negligence of the driver of the truck, for the defendants did not appeal from this judgment. Lacombe had been hauling sand and gravel to a highway construction site near the Ramah-Gross Tete section of I-10 highway project in Iberville Parish. It further appears quite evident from the record that the truck was overweight. T. L. James was the general contractor in charge of the highway project.

In the furtherance of the completion of this project, it was necessary for T. L. James to purchase sand and gravel to be used in the construction of the highway. Thus, in September of 1970, T. L. James issued a purchase order to Feliciana for the delivery of sand and gravel to the construction site. The purchase order was for all sand and gravel needed in the project and placed in a stock pile, with the option remaining in T. L. James to exempt from the purchase order that material required for structural concrete. The purchase order stipulated that the materials would be delivered as required for $3.50 per yard. Several months elapsed between the issuance of the purchase order and the preparation and readiness of the stock pile site, and in the meantime Feliciana had secured additional work closer to its home base. Henry E. Johnston was contacted by H. Allen Thomason for the purpose of determining whether Southeastern could supply the sand and gravel to T. L. James under the purchase order issued to Feliciana. Johnston informed Thomason that it was perfectly alright with him if he could receive the approval of Henry Spohrer, the field supervisor for T. L. James on this particular project. Since Johnston had found work closer to his home base, and could realize a greater margin of profit, he was happy to have someone else fulfill his contractual obligations with T. L. James. This approval was apparently received and Southeastern commenced the delivery of sand and gravel. Southeastern did not own the trucks in which the sand and gravel was transported, but rather leased them from Mallard.

The pits from which the sand and gravel came were neither owned nor controlled by T. L. James. There were no James's employees at the pit to either load or weigh the trucks. The trucks were weighed when they arrived at the stock pile area by scales operated by James's employees, though at times they were operated by the truck drivers. The weight tickets of each truck which are in evidence show that as a general rule all trucks delivering the sand and gravel were overweight. Though it could not be proved that the truck involved in the accident was overweight, because its load was dumped on the highway during the collision, it was presumed that it was overweight. The only instructions and directions from T. L. James as to the delivery of the sand and gravel was that a sufficient stock pile be created and maintained. Further instructions and directions were given to truck drivers as they entered the stock pile area to show them where to deposit the sand and gravel.

Southeastern would send its invoice to Feliciana for the sand and gravel delivered to T. L. James as well as the delivery cost, and in turn Feliciana would bill T. L. James for the sand and gravel delivered, and Hauling, Inc. would bill T. L. James for the delivery cost. T. L. James would pay these two invoices by check, and Feliciana and Hauling, Inc. would deposit the payments, and within one to two weeks Southeastern would be paid. The reason the billing was done in this fashion was to avoid a sales tax on the delivery cost and thus save T. L. James money.

At the end of the trial, and after having been charged by the court, the jury was presented with various interrogatories, and in answer to these found that Lacombe was negligent in the operation of his truck, that his negligence was a cause in fact of the accident, that he was qualified to drive the truck, that the truck was overloaded, and that this overload was a contributing cause in fact of the accident. It found, however, that the responsibility of seeing that the truck was not overloaded belonged to Mallard and/or Materials doing business as Southeastern. The jury determined that Lacombe was employed by Materials, that he was not a borrowed servant but that an agency relationship existed between T. L. James, Feliciana, Hauling, Southeastern, Materials and Mallard. It further found that Mallard was an independent contractor, Materials a supplier, Feliciana a supplier, Hauling an independent contractor, and T. L. James the prime contractor. It did not find that a joint adventure existed nor were any of the parties alter egos of the companies in which they were officers or stockholders.

Plaintiff, Mrs. Mabel Skinner, contends that (1) the jury erred in failing to find that Lacombe was an agent and employee of Materials, and Materials was an agent of T. L. James, thus making T. L. James liable; (2) in the alternative, the jury erred in failing to find that Hauling, Inc. was the hauling servant of T. L. James, thus making T. L. James liable; (3) in the alternative, the jury erred in failing to find that Materials was a hauling servant of Hauling, Inc., and if Hauling, Inc. was not a servant of T. L. James, it was a subcontractor, and as such T. L. James was required to carry insurance in a minimal amount of $200,000.00 since it failed to require Hauling, Inc. to insure itself, under the terms of the contract between T. L. James and Department of Highways; (4) the jury erred in failing to find that T. L. James, Hauling, Inc., Henry Johnston, Feliciana, H. Allen Thomason were additional parties responsible and legally liable for the overloading of the truck; and (5) the jury erred in granting an inadequate award for damages.

Plaintiff-intervenor, Trinity, contends that (1) the Court erred in not correctly explaining the concepts of "agency", "independent contractor" and "subcontractor" to the jury and (2) the jury erred by failing to find Lacombe was a borrowed employee of T. L. James and also erred in finding that T. L. James had no duty to remedy the gross overloading of the gravel trucks arriving at the job site.

As to the specification of error concerning the Trial Judge's instructions to the jury, we are of the opinion that in light of the Supreme Court's decision of *Gonzales v. Xerox Corp.*, 320 So.2d 163 (La.1975), there is no need for us to determine whether the Trial Judge was in error or not. Even if we would find the Trial Judge in error, under the holding of *Gonzales*, supra, rather than remanding for a new trial, we are compelled to render a decision.

A basic question to a resolution of the issues presented by this case is whether or not the sand and gravel haulers were hauling servants or employees of T. L. James, or simply an independent contractor, or whether Roderick Lacombe was a borrowed employee of T. L. James?

[1] Based on the facts as found in the record, we are of the opinion that the sand and gravel haulers were independent contractors and Roderick Lacombe was not a borrowed employee.

Plaintiff Skinner argues that the relationship between T. L. James and Hauling, Inc. or Materials Transport could be terminated at will, thus making the sand and gravel haulers mere employees. Though there are statements in the records by witnesses for both sides that they were of the opinion that their relationship was terminable at will, we are not convinced that it was. When T. L. James issued the purchase order for so many yards of sand and gravel to be delivered at a certain price, to a particular sand and gravel hauler, it com-

mitted itself to purchase the sand and gravel under the terms of the purchase order. Though there was no formal written contract, T. L. James was obligated to pay for the sand and gravel, and the recipient of the purchase order was obligated to deliver. As long as the sand and gravel was being delivered as contemplated under the purchase order, the relationship could not be terminated.

We do not believe that T. L. James exercised the requisite control and direction over the hauling contractor so as to remove the hauling contractor from the class of independent contractor. It is argued by plaintiff that T. L. James could direct when, where and how the sand and gravel was to be delivered, thus giving him complete control over the hauling contractor's activities. We do not interpret the facts as found in this case to be as such. The general instructions of T. L. James to the hauling contractor was simply that a sufficient stock pile of sand and gravel be built up and be maintained once T. L. James began using sand and gravel in the manufacture of concrete. Other than designating where the sand and gravel were to be deposited at the construction site, T. L. James did not exercise any control over which routes the sand and gravel trucks were to take, the frequency of deliveries, nor which drivers could deliver, other than possibly to disapprove of an individual who drove carelessly at the construction site.

We have reviewed the case of *Richardson v. Tate*, 269 So.2d 278 (La.App. 4th Cir. 1972) which held that the driver of the hauling contractor was a borrowed employee of the general contractor. After comparing the facts as presented in *Richardson v. Tate*, supra, to the facts presented in the instant case, we do not find *Richardson v. Tate* to be controlling and is distinguishable from the facts in the instant case.

[2] It is additionally argued that the trial judge and jury erred in failing to find that T. L. James, Hauling, Inc., Henry A. Johnston, Feliciana, and H. Allen Thomason were additionally responsible and legally liable for failing to remedy the overloading of the sand and gravel truck. Both appellants argued that these defendants had knowledge of the overloading, that it was in violation of state law, that this overloading created a highly dangerous condition on the highways of the state, and thus it was their duty to either stop the overloading or refuse to accept delivery of the sand and gravel because of the violation.

It occurs to us that these defendants, and in particular, T. L. James, are in no different position than an ordinary land owner who ordered several truck loads of land fill, and after several deliveries realized that they were overloaded but did nothing about it. We know of no duty imposed on these defendants, who had no direct control over the loading process, to stop the overloading or to refuse delivery. Since we conclude there is no duty, there is no error on the part of the judge or jury in failing to find them liable.

It is further argued that T. L. James was required to have insurance to cover its subcontractors, and thus it is liable. It could be reasoned that the State of Louisiana through the Department of Highways in letting contracts for various projects throughout the state mandates certain minimum insurance requirements from both the general or prime contractor as well as subcontractors doing work thereunder so as to protect members of the general public who may be injured by activities relating to the particular contract by having sufficient insurance coverage on behalf of those parties who may be at fault. It could be further said that it is the policy of the Highway Department to only let contracts to those individuals, partnerships, associations and corporations who are willing and show a desire to carry a requisite amount of public liability and property damage insurance so as to guarantee at least up to the insurance coverage payment for any damage occasioned by any member of the general public by the fault of an insured.

Carrying then this statement of public policy on the part of the State of Louisiana to its logical conclusion, one must then reason that the state would want any individual, partnership, association or corporation doing business with the state under a contract let to another to be covered by the insurance as required by the state, regardless of the legal definition or relationship that this particular entity may have with the prime contractor. As above noted, the general contract provides that not only must the prime contractor carry a certain amount of public liability and property damage insurance, but if any part of the work is sublet, similar insurance shall be provided by or in behalf of the subcontractors to cover their operations. The question therefore remains as to whether, even though Mallard Truck Lines, Inc. was classified by the jury as an independent contractor and Materials Transport, Inc. d/b/a Southeastern Materials Co. having been classified by the jury as a supplier could be further classified under the general terms of the contract and the above stated policy of the state as subcontractors.

[3] It has been argued to the Court that the suppliers of sand and gravel must be treated as subcontractors under the interpretation of the contract since these provisions of the contract were placed in the contract by federal authorities as the United States Government was financing all interstate operations on the basis of 90% paid by the United States Government and 10% paid by the state government, and that federal law provides that a subcontract may call for the furnishing of supplies. Inasmuch as this is a contract entered into by a state agency, rather than a federal agency, we are of the opinion that any interpretation of the terms used in the contract must be controlled by applicable state law rather than federal law, irrespective of the fact that federal monies were being used partly for the funding of the contract.

[4] We have searched the terms of the general contract, and in particular that portion requiring minimum insurance coverage, and can find no language therein defining the term "subcontractor" so as to aid this Court in determining whether the contract intended to include within the term subcontractor the suppliers of material. Further, we find no language within the contract setting forth a general policy on the part of the State of Louisiana through the Department of Highways of an intention to mandate that any and every individual, partnership, association and corporation doing business on the project authorized by the contract be covered by a minimum amount of public liability and property damage insurance. Absent these two findings, this Court must conclude that the terms "subcontractor" as used in the contract was not intended to include the supplier of materials as regards the minimum insurance coverage, and this Court cannot add that to the contract, nor can we establish such as state public policy.

[5] Plaintiff-Skinner lastly contends that the quantum awarded by the jury was manifestly erroneous in that it was excessively low. The jury awarded Mrs. Skinner $123,000.00 without designating any breakdown in the award for loss of financial support, special damages, and damages for loss of companionship, love and affection.

Dr. Jan W. Duggar testified on behalf of Mrs. Skinner as an expert in the field of economics. In arriving at the conclusion that the economic loss to Mrs. Skinner as the result of the death of her husband amounted to $120,491.00, Dr. Duggar took into consideration the age and life expectancy of Mr. Skinner, the number of years he could be expected to continue to work, his past and future earnings, deduction therefrom personal expenses or the cost of maintenance of Mr. Skinner if he had lived, as well as discounting the total figure inasmuch as it was to be received in a lump sum rather than over a period of time.

Mrs. Skinner argues that in addition to the $120,491.00 economic loss, there was an additional loss of $3,707.80 which included the deductible amount for damages to the Skinner's automobile, funeral and burial expenses, as well as ambulance service. She argues that it is obvious the jury gave her nothing for the loss of love, companionship and affection. She further argues that she and the deceased were a very close couple, had no children of their own, and as she

testified, "if all the homes in Baton Rouge was as happy as ours there would be no divorces, the judges would have to go out of business, so all I have got to say is that when they killed my husband they took all I had." She cites to this Court the case of *Cacibauda v. Gaiennie*, 305 So.2d 572 (La. App. 4th Cir. 1974), *rehearing denied* (1975) as authority for an award of $95,000.00 for the loss of love, companionship and affection.

As we pointed out above, the jury did not itemize the damages awarded. We know not whether the jury gave any award for the loss of love, companionship and affection. By the same token, the jury could have awarded as an economic loss an amount less than that recommended by the expert witness, and thus also award damages for loss of love, etc. Though we are of the opinion that this award taken in its totality is conservative, we are not convinced that it is so conservative or low so as to allow this Court to declare it an abuse of that discretion granted juries in the awarding of damages.

JUDGMENT IN NO. 10993

Therefore, for the above and foregoing reasons the judgment of the Trial Court is affirmed. All costs of this appeal are to be paid by plaintiff-appellant.

AFFIRMED

JUDGMENT IN NO. 11057

For the reasons stated above the judgment of the Trial Court will be affirmed. All costs of this appeal to be paid by plaintiff-appellant.

Emogene Jones CHAMBLEE

v.

Charles Burr CHAMBLEE.

No. 7683.

Court of Appeal of Louisiana, Fourth Circuit.

Nov. 16, 1976.

Rehearing Denied Dec. 14, 1976.

Wife filed petition seeking separation from bed and board from husband. The 24th Judicial District Court, Parish of Jefferson, No. 172-517, Division "A", Louis DeSonier, Jr., J., entered final judgment decreeing a separation a mensa et thoro in favor of wife, and husband appealed. The Court of Appeal, Beer, J., held that mere showing on party of complaining wife that husband had withdrawn from matrimonial domicile was not, standing alone, sufficient to shift burden to husband to prove that the alleged abandonment had been for lawful cause; and that husband's failure to return to matrimonial domicile without lawful cause could not be imputed from fact alone that he did depart.

Affirmed in part and, in part, remanded for further proceedings.

Lemmon, J., filed a specially concurring opinion.

1. Appeal and Error ⇐339(6)

Normally, appellant has 30 days to take an appeal, and furnish security therefor, from the court's refusal to grant a timely application for a new trial. LSA-C.C.P. arts. 1974, 2087(1-3), 3942.

2. New Trial ⇐116(2)

Delay for applying for a new trial commences to run on the day after the judgment was signed. LSA-C.C.P. art. 1974.

3. New Trial ⇐116(2)

Where application for new trial was premature and thus not timely and without legal effect, delay for new trial commenced to run on day after judgment was signed. LSA-C.C.P. arts. 1974, 2087(1-3).

COURT'S CHARGE TO THE JURY:

. . . .

EXHIBIT "C"

Interrogatory No.

14. The Court has given you the law regarding the legal status of a (or will give, in this instance) (1) prime contractor, (2) a subcontractor, (3) supplier and (4) an independent contractor. What status did the following companies occupy:

Mallard Truck Lines
Material Transport, Inc.
Feliciana Sand and Gravel
Hauling, Inc.
T. L. James and Company
That requires your determination, what status, if any, these companies occupied.

. . . .

Now, the responsibility of the individual defendants in this case varies

according to their status which has been established by Louisiana law. It is your responsibility to determine from the facts what status each of the defendants may have occupied with relationship to other defendants.

Generally, an employer is liable for the tort or negligent injury committed by his employee if, at the time, the employee is acting within the scope of his employment.

With regard to whether the "borrowed servant" doctrine is applicable in this case, it is the law of this State that when an employee in general employment of one employer becomes the borrowed servant (synonymous with employee) of another employer, the general employer is not responsible for the acts of the servant. Likewise, the other employer then can become liable. One test that may be applied is to determine in whose business the servant was engaged when the accident

occurred and another is to determine which person had the right of control over the employee at the time the accident occurred. The mere division of control over the employee committing the tort does not in itself raise a presumption that the general employer is liable and the burden is on the party asserting the borrowed servant doctrine to show that with respect to the particular work the employee has been lent and is performing on the borrower's work.

Another contention raised by the pleadings is that there existed an "agency relationship" between some of the parties. Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by others to act. One of the primary elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent, and the power of the agent to act for the principal.

It is not essential to the existence of an agency relationship for the agent to be an employee of the principal or for the agent to receive compensation for his service. Generally, a principal is responsible for the acts of his agents committed within the scope of the agency. Also, an agent may incur liability to third parties, provided the agent is found to have owed the third party a duty and has breached that duty.

A "joint adventure" is one in which two or more persons combine their property or labor in the conduct of a particular line of trade or general business for joint profits. In order to qualify as a joint adventure there must not only be a joint interest in the object of the enterprise, but also an equal right to direct and control the conduct of each other in the operation of the enterprise.

The joint adventure's liability is the same as that of partners, joint adventure's relation being governed by principles consituting the law of partner-

ship. Members of an ordinary partnership are liable for the torts of one of their number, though they had no knowledge thereof, where such torts are committed in the course of the partnership business.

Whether one occupies the status of a subcontractor or supplier of materials depends solely upon the facts which you, the jury, determine. A prime or principal contractor is one who contracts to perform work on a large scale, whereas a subcontractor means one who takes from a principal contractor a specific part of the work and does not include laborers or materialmen. Generally, the test of whether a supplier of materials is a subcontractor is whether the person furnishing the materials thereafter performs any labor in attaching the materials within the construction.

Another factual determination that you will be asked to make is whether Feliciana Sand and Gravel Company, Hauling, Inc., Materials Transport, Inc., doing business as Southeastern Materials

Company and Mallard Truck Lines, Inc., were dummy corporations, and as such, the alter egos of Henry E. Johnston and Allen Thomason, respectively.

. . . .

"D"

EXTRACT FROM EXHIBIT OFFERED IN EVIDENCE AS P-7, BEING THE CONTRACT BETWEEN T. L. JAMES AND COMPANY, INC. AND STATE OF LOUISIANA THROUGH THE DEPARTMENT OF HIGHWAYS TO CONSTRUCT FEDERAL AID PROJECT NO. I-10-3(53) 134; RAMAH-PORT ALLEN HIGHWAY (RAMAH-GROSSE TETE) LOCATED IN IBERVILLE PARISH, ROUTE I-10. LENGTH: 4.924 Miles
Construction Estimate: $9,562,000.00

Attachment 1
Page 1 of 4 Pages
Rev. 12/68

STATE OF LOUISIANA
REQUIRED CONTRACT PROVISIONS
ALL FEDERAL-AID CONSTRUCTION CONTRACTS

I. APPLICATION

1. "These contract provisions shall apply to all work performed on the contract by the contractor with his own organization and with the assistance of workmen under his immediate superintendent and to all work performed on the contract by piecework, station work or by subcontract."

VII. SUBLETTING OR ASSIGNING THE CONTRACT

2."....The contractor shall perform, with his own organization contract work

amounting to not less than 50 percent of the original total contract price, except that any items designated by the State as "Specialty Items" may be performed by subcontract and the amount of any such "Specialty Items" so performed may be deducted from the original total contract price before computing the amount of work required to be performed by the contractor with his own organization....."

3. "In addition to the 50 percent requirement set forth in paragraph 2 above, the contractor shall furnish (a) a competent superintendent or foreman who is employed by him, who has full authority to direct performance of the work in accordance with the contract requirements, and who is in charge of all construction operations (regardless of who performs the work)....

6. "No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the State Highway Department contracting officer, or his authorized representative, and such consent when given shall not be construed to relieve the contractor of any responsibility for the fulfillment of

the contract. Request for permission to sublet, assign or otherwise dispose of any portion of the contract shall be in writing and accompanied by (a) a showing that the organization which will perform the work is particularly experienced and equipped for such work, (b) an assurance by the contractor that the labor standards provisions set forth in this contract shall apply to labor performed on all work encompassed by the request.

VIII. SAFETY: ACCIDENT PREVENTION

In the performance of this contract, the contractor shall comply with all applicable Federal, State and local laws governing safety, health and sanitation. The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions, on his own responsibility, or as the State Highway Department contracting officer may determine, reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

INSURANCE: In addition to any other forms of insurance or bonds required under the terms of the contract and specifications, the contractor will be required to carry insurance of the following kinds and amounts:

1. Contractors' Public Liability and Property Damage Liability Insurance

The contractor shall furnish evidence to the Department that, with respect to the operations he performs, he carries regular Contractors' Public Liability insurance providing for a limit of not less than 200,000 Dollars for all damages arising out of bodily injuries to or death of one person, and, subject to that limit for each person, a total limit of 400,000 Dollars for all damages arising out of bodily injuries to or death of two or more persons in any one accident, and regular Contractors' Property Damage Liability insurance providing for a limit of not

less than 100,000 Dollars for all damages arising out of injury to or destruction of property in any one accident and, subject to that limit per accident, a total (or aggregate) limit of 200,000 Dollars for all damages arising out of injury to or destruction of property during the policy period.

If any part of the work is sublet similar insurance shall be provided by or in behalf of the subcontractors to cover their operations."

FILED
MAY 10 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1593

MRS. MABLE SKINNER,
Plaintiff-Petitioner

VERSUS

MALLARD TRUCK LINES, INC., ET AL
Defendants-Appellees

SUPPLEMENTAL APPENDIX TO THE PETITION OF MRS. MABLE SKINNER FOR WRIT OF CERTIORARI OR REVIEW TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

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SUPPLEMENTAL APPENDIX

EXHIBIT "B"

TRINITY UNIVERSAL INSURANCE COMPANY
v.
MALLARD TRUCK LINES, INC., et al

MRS. MABLE SKINNER
v.
MALLARD TRUCK LINES, INC., et al

Nos. 11057, 10993

Court of Appeal of Louisiana
First Circuit

Nov. 15, 1976
Rehearing Denied Dec. 20, 1976

(Cited as 340 So.2d 372)

Before SARTAIN, COVINGTON and LOTTINGER, JJ

LOTTINGER, Judge

This is a wrongful death action filed by Mrs. Mable Skinner, widow of James M. Skinner who died as a result of an automobile-truck collision. From a judgment in favor of the plaintiff, and against Mallard Truck Lines, Inc. (sometimes hereinafter referred to as Mallard), Materials Transport, Inc., d/b/a Southeastern Materials Company (sometimes hereinafter referred to as Materials and/or Southeastern), and

Employers Commercial Union Insurance Company (sometimes hereinafter referred to as Employers) in the sum of $123,000.00, but limiting the amount of the judgment against Employers to its policy limits of $5,000.00, the plaintiff has appealed.

In addition, Trinity Universal Insurance Company (hereinafter sometimes referred to as Trinity), the workmen's compensation insurance carrier of Mr. Skinner's employer filed an independent suit as well as intervening in this suit for recovery of the amount of compensation paid as well as those sums that Trinity may be obligated to pay in the future. Consolidation was had for trial below, the intervention being tried by the jury and the independent suit by the judge alone. From a judgment in favor of Trinity and against Mallard, Materials, and Employers in the amount of $11,192.00, as well as all sums paid in the future under the Louisiana Workmen Compensation Act, with the judgment against Employers being limited to the $5,000.00 policy limits, and that said judgment be paid prior to the award in favor of Mrs. Mable Skinner, Trinity has appealed.

Both of these appeals have been consolidated and will be handled in this opinion, but separate judgments will be rendered.

Mrs. Skinner in filing whis wrongful death action named various individuals and corporations, as well as the State of Louisiana through the Department of Highways as defendants, to-wit: Roderick W. Lacombe, driver of the truck which collided with the car the decedent was operating, and later dismissed by agreement; Mallard Truck Lines, Inc., owner of the truck operated by Lacombe; H. Allen Thomason, principal stockholder or sole owner of Mallard Truck Lines, Inc. and Materials Transport, Inc. doing business as Southeastern Materials Company; Louisiana Sand & Gravel Company of Baton Rouge, Inc., later dismissed by motion of both plaintiff and intervenor; Kenny L. Riley, later dismissed on a motion for summary judgment; Feliciana Sand & Gravel Company, Inc. (hereinafter sometimes referred to as Feliciana); Hauling, Inc., Henry Johnston, principal stockholder and sole owner of Feliciana Sand & Gravel Company, Inc. and Hauling, Inc.; T. L. James & Company,

Inc. (sometimes hereinafter referred to as T. L. James); State of Louisiana, through the Department of Highways, later dismissed on a motion for summary judgment; Highland Insurance Company, insurer of T. L. James; Employers Commercial Union Insurance Company, insurer of Mallard; General Motors Corporation, later dismissed on a motion for summary judgment; Capitol Mack, Inc., later dismissed on a motion for summary judgment; GMC. Inc., later dismissed on a motion for summary judgment; and Materials Transport, Inc., doing business as Southeastern Materials Company. Trinity basically sued the same defendants, though not all of them, and in addition named Fidelity and Casualty Company of New York as a defendant.

The record points out that on March 13, 1972, the decedent, James M. Skinner, while employed by Arrow Tobacco Company, and while on company business, was driving on Hooper Road, north of Baton Rouge, when he was involved in a head-on collision with a large gravel truck operated by Lacombe, owned by Mallard, but leased to Southeastern. The head-on collision took

place in Skinner's lane of travel. There seems to be no question as to the cause of the death of Mr. Skinner as well as the negligence of the driver of the truck, for the defendants did not appeal from this judgment. Lacombe had been hauling sand and gravel to a highway construction site near the Ramah-Gross Tete section of I-10 highway project in Iberville Parish. It further appears quite evident from the record that the truck was overweight. T. L. James was the general contractor in charge of the highway project.

In the furtherance of the completion of this project, it was necessary for T.L. James to purchase sand and gravel to be used in the construction of the highway. Thus, in September of 1970, T.L. James issued a purchase order to Peliciana for the delivery of sand and gravel to the construction site. The purchase order was for all sand and gravel needed in the project and placed in a stock pile, with the option remaining in T. L. James to exempt from the purchase order that material required for structural concrete. The purchase order stipulated

that the materials would be delivered as required for $3.50 per yard. Several months elapsed between the issuance of the purchase order and the preparation and readiness of the stock pile site, and in the meantime Feliciana had secured additional work closer to its home base. Henry E. Johnston was contacted by H. Allen Thomason for the purpose of determining whether Southeastern could supply the sand and gravel to T. L. James under the purchase order issued to Feliciana. Johnston informed Thomason that it was perfectly alright with him if he could receive the approval of Henry Spohrer, the field supervisor for T. L. James on this particular project. Since Johnston had found work closer to his home base, and could realize a greater margin of profit, he was happy to have someone else fulfill his contractual obligations with T. L. James. This approval was apparently received and Southeastern commenced the delivery of sand and gravel. Southeastern did not own the trucks in which the sand and gravel was transported, but rather leased them from Mallard.

The ptis from which the sand and gravel came were neither owned nor controlled by T. L. James. There were no James's employees at the pit to either load or weigh the trucks. The trucks were weighed when they arrived at the stock pile area by scales operated by James's employees, though at times they were operated by the truck drivers. The weight tickets of each truck which are in evidence show that as a general rule all trucks delivering the sand and gravel were overweight. Though it could not be proved that the truck involved in the accident was overweight, because its load was dumped on the highway during the collision, it was presumed that it was overweight. The only instructions and directions from T. L. James as to the delivery of the sand and gravel was that a sufficient stock pile be created and maintained. Further instructions and directions were given to truck drivers as they entered the stock pile area to show them where to deposit the sand and gravel.

Southeastern would send its invoice to Feliciana for the sand and gravel

delivered to T.L. James as well as the delivery cost, and in turn Feliciana would bill T.L. James for the sand and gravel delivered, and Hauling, Inc. would bill T.L. James for the delivery cost. T.L. James would pay these two invoices by check, and Feliciana and Hauling, Inc. would deposit the payments,and within one to two weeks Southeastern would be paid. The reason the billing was done in this fashion was to avoid a sales tax on the delivery cost and thus save T.L. James money.

At the end of the trial, and after having been charged by the court, the jury was presented with various interrogatories, and in answer to these found that Lacombe was negligent in the operation of his truck, that his negligence was a cause in fact of the accident, that he was qualified to drive the truck, that the truck was overloaded, and that this overload was a contributing cause in fact of the accident. It found, however, that the responsibility of seeing that the truck was not overloaded belonged to Mallard and/or Materials doing business as Southeastern. The jury de-

termined that Lacombe was employed by Materials, that he was not a borrowed servant but that an agency relationship existed between T. L. James, Feliciana, Hauling, Southeastern, Materials and Mallard. It further found that Mallard was an independent contractor, Materials a supplier, Feliciana a supplier. Hauling an independent contractor, and T.L. James the prime contractor. It did not find that a joint adventure existed nor were any of the parties alter egos of the companies in which they were officers or stockholders.

Plaintiff, Mrs. Mable Skinner, contends that (1) the jury erred in failing to find that Lacombe was an agent and employee of Materials, and Materials was an agent of T.L. James, thus making T.L. James liable; (2) in the alternative, the jury erred in failing to find that Hauling, Inc. was the hauling servant of T.L. James, thus making T.L. James liable; (3) in the alternative, the jury erred in failing to find that Materials was a hauling servant of Hauling, Inc., and if Hauling, Inc. was not a servant of T.L. James, it was a subcontractor, and as

such T.L. James was required to carry insurance in a minimal amount of $200,000.00 since it failed to require Hauling, Inc., to insure itself, under the terms of the contract between T.L. James and Department of Highways; (4) the jury erred in failing to find that T. L. James, Hauling, Inc., Henry Johnston, Feliciana, H. Allen Thomason were additional parties responsible and legally liable for the overloading of the truck; (5) the jury erred in granting an inadequate award for damages.

Plaintiff-intervenor, Trinity, contends that (1) the Court erred in not correctly explaining the concepts of "agency","independent contractor", and "subcontractor" to the jury and (2) the jury erred by failing to find Lacombe was a borrowed employee of T. L. James and also erred in finding thatT. L. James had no duty to remedy the gross overloading of the gravel trucks arriving at the job site.

As to the specification of error concerning the Trial Judge's instructions to the jury, we are of the opinion that in light of the Supreme Court's decision of Gonzales v. Xerox Corp., 320 So.2d

163 (La.1975), there is no need for us to determine whether the Trial Judge was in error or not. Even if we would find the Trial Judge in error, under the holding of Gonzales, supra, rather than remanding for a new trial, we are compelled to render a decision.

A basic question to a resolution of the issues presented by this case is whether or not the sand and gravel haulers were hauling servants or employees of T.L. James, or simply an independent contractor, or whether Roderick Lacombe was a borrowed employee of T.L. James?

[1] Based on the facts as found in the record, we are of the opinion that the sand and gravel haulers were independent contractors and Roderick Lacombe was not a borrowed employee.

Plaintiff-Skinner argues that the relationship between T.L. James and Hauling, Inc. or Materials Transport could be terminated at will, thus making the sand and gravel haulers mere employees. Though there are statements in the records by witnesses for both sides that they were of the opinion that their relationship was terminable at will, we are not convinced

that it was. When T.L. James issued the purchase order for so many yards of sand and gravel to be delivered at a certain price, to a particular sand and gravel hauler, it committed itself to purchase the sand and gravel under the terms of the purchase order. Though there was no formal written contract, T. L. James was obligated to pay for the sand and gravel, and the recipient of the purchase order was obligated to deliver. As long as the sand and gravel was being delivered as contemplated under the purchase order, the relationship could not be terminated.

We do not believe that T.L. James exercised the requisite control and direction over the hauling contractor so as to remove the hauling contractor from the class of independent contractor. It is argued by plaintiff that T.L. James could direct when, where and how the sand and gravel was to be delivered, thus giving him complete control over the hauling contractor's activities. We do not interpret the facts as found in this case to be as such. The general instructions of T.L. James to the hauling contractor was simply that a sufficient stock pile

of sand and gravel be built up and be maintained once T.L. James began using sand and gravel in the manufacture of concrete. Other than designating where the sand and gravel were to be deposited at the construction site, T.L. James did not exercise any control over which routes the sand and gravel trucks were to take, the frequency of deliveries, nor which drivers could deliver, other than possibly to disapprove of an individual who drove carelessly at the construction site.

We have reviewed the case of Richardson v. Tate, 269 So.2d 278 (La.App. 4th Cir. 1972) which held that the driver of the hauling contractor was a borrowed employee of the general contractor. After comparing the facts as presented in Richardson v. Tate, supra, to the facts presented in the instant case, we do not find Richardson v. Tate to be controlling and is distinguishable from the facts in the instant case.

[2] It is additionally argued that the trial judge and jury erred in failing to find that T.L. James, Hauling, Inc., Henry A. Johnston, Feliciana, and H. Al-

len Thomason were additionally responsible and legally liable for failing to remedy the overloading of the sand and gravel truck. Both appellants argued that these defendants had knowledge of the overloading, that it was in violation of state law, that this overloading created a highly dangerous condition on the highways of the state, and thus it was their duty to either stop the overloading or refuse to accept delivery of the sand and gravel because of the violation.

It occurs to us that these defendants, and in particular, T.L. James, are in no different position than an ordinary land owner who ordered several truck loads of land fill, and after several deliveries realized that they were overloaded but did nothing about it. We know of no duty imposed on these defendants, who had no direct control over the loading process, to stop the overloading or to refuse delivery. Since we conclude there is no duty, there is no error on the part of the judge or jury in failing to find them liable.

It is further argued that T.L. James was required to have insurance to cover its subcontractors, and thus it is liable. It could be reasoned that the State of

Louisiana through the Department of Highways in letting contracts for various projects throughout the state mandates certain minimum insurance requirements from both the general or prime contractor as well as subcontractors doing work thereunder so as to protect members of the general public who may be injured by activities relating to the particular contract by having sufficient insurance coverage on behalf of those parties who may be at fault. It could be further said that it is the policy of the Highway Department to only let contracts to those individuals, partnerships, associations and corporations who are willing and show a desire to carry a requisite amount of public liability and property damage insurance so as to guarantee at least up to the insurance coverage payment for any damage occasioned by any member of the general public by the fault of an insured.

Carrying then this statement of public policy on the part of the State of Louisiana to its logical conclusion, one must then reason that the state would want any individual, partnership, association or corporation doing business with

the state under a contract let to another to be covered by the insurance as required by the state, regardless of the legal definition or relationship that this particular entity may have with the prime contractor. As above noted, the general contract provides that not only must the prime contractor carry a certain amount of public liability and property damage insurance, but if any part of the work is sublet, similar insurance shall be provided by or in behalf of the subcontractors to cover their operations. The question therefore remains as to whether, even though Mallard Trucl Lines, Inc. was classified by the jury as an independent contractor and Materials Transport, Inc. d/b/a Southeastern Materials Co. having been classified by the jury as a supplier could be further classified under the general terms of the contract and the above stated policy of the state as subcontractors.

[3] It has been argued to the Court that the suppliers of sand and gravel must be treated as subcontractors under the interpretation of the contract since these provisions of the contract were placed in

the contract by federal authorities as the United States Government was financing all interstate operations on the basis of 90% paid by the United States Government and 10% paid by the state government, and that federal law provides that a subcontract may call for the furnishing of supplies. Inasmuch as this is a contract entered into by a state agency, rather than a federal agency, we are of the opinion that any interpretatinon of the terms used in the contract must be controlled by applicable state law rather than federal law, irrespective of the fact that federal monies were being used partly for the funding of the contract.

[4] We have searched the terms of the general contract, and in particular that portion requiring minimum insurance coverage, and can find no language therein defining the term "subcontractor" so as to aid this Court in determining whether the contract intended to include within the term subcontractor the suppliers of material. Further, we find no language within the contract setting forth a general policy on the part of the State of Louisiana through the Department of

Highways of an intention to mandate that any and every individual, partnership, association and corporation doing business on the project authorized by the contract be covered by a minimum amount of public liability and property damage insurance. Absent these two findings, this Court must conclude that the terms "subcontractor" as used in the contract was not intended to include the supplier of materials as regards the minimum insurance coverage, and this Court cannot add that to the contract, nor can we establish such as state public policy.

[5] Plaintiff-Skinner lastly contends that the quantum awarded by the jury was manifestly erroneous in that it was excessively low. The jury awarded Mrs. Skinner $123,000.00 without designating any breakdown in the award for loss of financial support, special damages, and damages for loss of companionship, love and affection.

Dr. Jan W. Duggar testified on behalf of Mrs. Skinner as an expert in the field of economics. In arriving at the conclusion that the economic loss to Mrs. Skinner as the result of the death of her

husband amounted to $120,491.00, Dr. Duggar took into consideration the age and life expectancy of Mr. Skinner, the number of years he could be expected to continue to work, his past and future earnings, deduction therefrom personal expenses or the cost of maintenance of Mr. Skinner if he had lived, as well as discounting the total figure inasmuch as it was to be received in a lump sum rather than over a period of time.

Mrs. Skinner argues that in addition to the $120,491.00 economic loss, there was an additional loss of $3,707.85 which included the deductible amount for damages to the Skinner's automobile, funeral and burial expenses, as well as ambulance service. She argues that it is obvious the jury gave her nothing for the loss of love, companionship and affection. She further argues that she and the deceased were a very close couple, had no children of their own, and as she testified, "if all the homes in Baton Rouge was as happy as ours there would be no divorces, the judges would have to go out of business, so all I have got to say is that when they killed my husband they took all I had." She cites to this Court the case

of Cacibauda v. Gaiennie, 305 So.2d 572 (La. App. 4th Cir. 1974), rehearing denied (1975) as authority for an award of $95,000.00 for the loss of love, companionship and affection.

As we pointed out above, the jury did not itemize the damages awarded. We know not whether the jury gave any award for the loss of love, companionship and affection. By the same token, the jury could have awarded as an economic loss an amount less than that recommended by the expert witness, and thus also award damages for loss of love, etc. Though we are of the opinion that this award taken in its totality is conservative, we are not convinced that it is so conservative or low so as to allow this Court to declare it an abuse of that discretion granted juries in the awarding of damages.

JUDGMENT IN NO. 10993

Therefore, for the above and foregoing reasons the judgment of the Trial Court is affirmed. All costs of this appeal are to be paid by plaintiff-appellant.

AFFIRMED

JUDGMENT IN NO. 11057

For the reasons stated above the judgment of the Trial Court will be affirmed. All costs of this appeal to be paid by plaintiff-appellant.

(end)

* * * * * * * * * *

Joseph A. Gladney

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C E R T I F I C A T E

I hereby certify that three copies of the foregoing Supplemental Appendix to the Petition of Mrs. Mable Skinner for Writ of Certiorari or Review to the Court of Appeal, First Circuit, State of Louisiana, has been mailed, postage prepaid to all counsel of record: Ben W. Lightfoot, Suite 614, 451 Florida Blvd., Baton Rouge, La. 70801; Henry D. Salassi, Jr., 701 Fidelity Nat'l Bank Bl., Baton Rouge, La. 70801; Frank M. Coates, Jr., 451 Fla. Blvd., Baton Rouge, La., 70801, and William C. Kaufman, III, 8225 Florida Boulevard, Baton Rouge, Louisiana 70815; Also to the Supreme Court of Louisiana and to the Court of Appeal, First Circuit, State of Louisiana, on this 23rd day of May, 1977.

Joseph A. Gladney

JOSEPH A. GLADNEY

BEST COPY AVAILABLE